* Together with No. 1048, Illinois Central Railroad Co. et al. v. City of Chicago et al.

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No. 1047

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In the Supreme Court of the United States

OCTOBER TERM, 1968

CITY OF CHICAGO and BOARD OF TRADE OF THE CITY OF CHICAGO,

Appellants,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ILLINOIS CENTRAL RAILROAD COMPANY, et al.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

JURISDICTIONAL STATEMENT

Appellants, City of Chicago and Board of Trade of the City of Chicago, plaintiffs in the court below, submit this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that the questions presented by the appeal are substantial.

OPINIONS BELOW

The opinion of the three-judge United States District Court for the Northern District of Illinois, Eastern Division, filed July 25, 1968, is reported at 291 F. Supp. 858, and is set forth in Appendix A hereto. The judgment of the District Court, entered July 25, 1968, vacating and setting aside the involved orders of the Interstate Commerce Commission, dated May 10, 1965, and March 13, 1967, and remanding the cause to the Commission for further proceedings consistent with the opinion of the court, is set forth in Appendix B hereto. The report and order of the Interstate Commerce Commission, Division 2, dated May 10, 1965, is reported at 325 I.C.C. 412, and is set forth in Appendix C hereto. The report and order of the Commission on reconsideration, dated March 13, 1967, is reported at 329 I.C.C. 529, and is set forth in Appendix D hereto.

JURISDICTION

This action was brought by appellants herein pursuant to the provisions of 28 U.S.C. §§ 1336, 1398, 2284, and 2321-2325, and 5 U.S.C. § 1009 (now 5 U.S.C. § 702), to enjoin, set aside, annul, and suspend two orders of the Interstate Commerce Commission previously referred to, entered May 10, 1965, and March 13, 1967, in the Commission's docket No. 34348, *Board of Trade of the City of Chicago* v. *Illinois Central Railroad Company, et al.* (App. C, p. C-14; App. D, p. D-14) The judgment of the District Court vacating and setting aside such orders and remanding the cause to the Commission for further proceedings consistent with the opinion of the court was entered July 25, 1968. On August 2, 1968, the intervening defendant railroads and processors and New Orleans Traffic and Transportation Bureau filed with the court a motion for new trial. On August 5, 1968, plaintiffs, City of Chicago and Board of

Trade, filed with the court a motion for amended and additional findings or for a new trial. All such motions were timely filed and all were denied by the court by order entered October 21, 1968. Notice of appeal was filed by the appellants herein in the United States District Court for the Northern District of Illinois on December 20, 1968. Notices of appeal have also been filed by the railroads and certain of the processors.

Jurisdiction of the Supreme Court to review the judgment of the three-judge District Court by direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b). Such jurisdiction is sustained by a large number of cases, including *Baltimore & O. R. Co.* v. *Boston & M. R. Co.*, 373 U.S. 372 (1963); *Burlington Truck Lines* v. *United States*, 371 U.S. 156 (1962); *Mechling Barge Lines* v. *United States*, 376 U.S. 375 (1964).

STATUTES INVOLVED

Section 1(5) of the Interstate Commerce Act, 49 U.S.C. §1(5):

> All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

Section 3(1) of the Interstate Commerce Act, 49 U.S.C. §3(1):

> It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular de-

scription of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever . . .

Title 5 U.S.C. §557(c):

All decisions . . . shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; . . .

Title 5 U.S.C. §706:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, [and] interpret . . . statutory provisions, . . . The reviewing court shall—

. . .

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

. . .

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; . . .

QUESTIONS PRESENTED

1. Did the Commission misinterpret section 3(1) of the Interstate Commerce Act in holding that the port of Chicago is unduly prejudiced only to the extent that rates to Chicago exceed in absolute amounts those to competing ports without regard to the relative services involved, or must the Commission, in deciding questions of undue preference and prejudice among ports under section 3(1), consider the propriety of the rate *levels* to the competing ports, relative transportation services considered?

2. Do the same rules and principles for determining undue preference and prejudice under section 3(1) of the Act and for determining just and reasonable rates under section 1(5) which apply in cases involving individual shippers and non-port localities also apply in cases involving ports, so that a port which has a substantial distance advantage is entitled to have that advantage properly recognized, or did the 1935 amendment to section 3(1) change the prevailing rules for determining preference, prejudice, and reasonableness among ports so as to confer on the Commission the right to follow an arbitrary policy of port equalization without regard to substantial differences in distances to such parts?

3. Did the Commission, as a result of the foregoing errors of law, apply incorrect legal standards in withholding from the port of Chicago just, reasonable, and nonprejudicial export rates which would give proper recognition to Chicago's advantage of location?

4. Did the District Court err, in violation of 5 U.S.C. § 706 and of sound and expeditious judicial administration, in refusing to decide the foregoing legal questions relating to the proper interpretation of sections 3(1) and 1(5) of the Act.

STATEMENT OF THE CASE

The Board of Trade of the City of Chicago brought this action before the Commission to establish the right of the port of Chicago to an inland export freight rate adjustment which properly reflects the substantial distance advantage of the port of Chicago *vis-a-vis* competing Gulf ports with respect to soybeans grown in central and southern Illinois, the greatest soybean-producing area in the United States. The City of Chicago intervened in the proceeding on behalf of the Board of Trade. From these areas the rates on soybeans to Chicago, for export, were on a level approximately 150 percent of that to Gulf ports, relative transportation services considered, and from a substantial part of the origin areas the rates to Chicago were actually higher, in cents per 100 pounds, than the rates to the Gulf, although the distances to the Gulf were approximately two and a half times those to Chicago.

The Commission has recognized that it does not have power to adjust rates among individual shippers and nonport localities for the purpose of offsetting the advantages and disadvantages of location but, in the case of ports, purportedly because of the 1935 amendment to section 3(1) of the Act, the Commission has recently been following an arbitrary policy of port equalization with an ever increasing disregard of substantial differences in the distances to competing ports.[1] [2] Following that policy in this case, Divi-

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[1] Commissioner Murphy, in dissenting in part, pointed out (329 I.C.C. at 537; App. D, p. D-13) that "pursued to the ultimate by parties in future proceedings we would be bound to provide port equalization for almost all ports from locations throughout the country."

[2] The 1935 amendment added the words "port" and "port district" to section 3(1) as a result of this Court's decision in *Texas & Pacific Ry. Co.* v. *United States*, 289 U.S. 627. See pp. 15-17, *infra*.

sion 2 of the Commission held that the involved rates were not unreasonable and that the port of Chicago was unduly prejudiced under section 3(1) only to the extent that the rates to Chicago exceeded, in cents per 100 pounds, the rates to the Gulf ports from the same Illinois origins, although the distances to the Gulf ports were approximately 250-270 percent of those to Chicago.

On April 6, 1966, the railroad defendants complied with the order by reducing the rates from southern Illinois to Chicago so that they would be no higher than the rates to New Orleans in cents per 100 pounds. Pursuant to relief from the long-and-short-haul clause of section 4 of the Act, 49 U.S.C. § 4, the rate established from Cairo to Chicago was 20.5 cents per 100 pounds, the same as to New Orleans, and as one progressed northward and the distance to Chicago *decreased* the rate to Chicago *increased* up to Centralia, Ill., (252 miles to Chicago and 666 miles to New Orleans) where the rate was the same to both points, 28.5 cents. Proceeding further north, a 26.5-cent rate group was encountered, from which the corresponding rate to New Orleans was 38.5 cents. At the northern end of this group is Gilman, 81 miles from Chicago, from which the rate established to Chicago was 26.5 cents, 6.5 cents higher than the rate from Cairo, 365 miles from Chicago. (See App. E, Illus. No. 7).[3]

After entry of the original report by Division 2, the Board of Trade filed an extensive petition for reconsider-

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[3] The rate situation in effect at the time of the filing of the Board of Trade's complaint and the rate situation resulting from the Commission's decision are explained and illustrated in Appendix E.

ation and oral argument, placing emphasis on the legal issues. This petition was denied. Upon petition of the Board of Trade, the Commission thereupon declared the proceeding to be one involving an issue of general transportation importance, thus permitting a petition for reconsideration to the entire Commission. The Board of Trade filed such a petition, in which it again reviewed in detail the applicable law and facts and requested oral argument. This petition was denied by a simple order by a 6-to-5 vote, without a report. The City of Chicago and the Board of Trade thereupon filed this action in the District Court to set aside the report and order of the Commission, by Division 2.

After the filing of this action, and in spite of the fact that it had just denied two petitions for reconsideration and oral argument, the Commission, on its own motion, and prior to the filing of an answer herein by the Commission or the United States, reopened the involved proceedings for reconsideration on the record as made, and, on June 23, 1966, the District Court, upon joint motion of the United States and the Commission, deferred further proceedings until conclusion of the administrative proceedings before the Commission. On March 13, 1967, the entire Commission entered its report and order on reconsideration, 329 I.C.C. 529 (Appendix D hereto), in which a majority of the entire Commission, with one commissioner dissenting, one dissenting in part, and one not participating, affirmed the findings of Division 2 in the prior report.

Plaintiffs thereupon filed their amended complaint in the District Court. The United States, the statutory defen-

dant, filed a neutral answer neither admitting nor denying the allegations in the amended complaint and stating that the United States "neither supports nor opposes the order of the Commission." The Commission and intervening defendant railroads and processors defended the orders.

The District Court held that the Commission's orders were irrational and unsupported by the findings. It vacated the orders and set them aside and remanded the cause to the Commission for further proceedings consistent with the opinion of the court. However, the District Court refused to pass upon the important legal questions relating to the proper interpretation of section 3(1) and section 1(5) of the Act, upon which this case must ultimately be resolved, although it noted that such questions were "vigorously argued" by both sides (App. A, pp. A-10-11).

After entry of the District Court's judgment vacating and setting aside the orders, plaintiffs filed a motion for amended and additional findings, again vigorously arguing that the court should decide the legal questions presented. This motion was denied.

Although the judgment of the District Court was in favor of the appellants to the extent that the involved orders of the Interstate Commerce Commission were annulled and set aside, appellants appeal from that judgment remanding the cause to the Commission for further proceedings because the District Court refused to decide the important legal questions presented to it relating to the proper interpretation of certain provisions of the Interstate Commerce Act, the determination of which is critical

to the resolution of the issues in this case. For reasons hereafter set forth, appellants respectfully submit that these legal questions should be decided by this Court before the cause is returned to the Commission for further administrative proceedings.

THE QUESTIONS ARE SUBSTANTIAL

I.

In 1959, with the completion of the new St. Lawrence Seaway, Chicago became a deep-water world port. The most important area in the United States for the origination of export traffic is the area which is naturally tributary to the port of Chicago; but most of the export traffic from that area moves through tidewater Gulf, Atlantic, and Pacific coast ports. One of the primary reasons, if not the single most important reason, why this is so is because Chicago has not been able to obtain just and reasonable, non-prejudicial adjustments of inland export freight rates which properly recognize Chicago's inherent advantage of location.

Chicago, being a seasonal and new deepwater port, must compete for export traffic with older, strongly entrenched, year-round tidewater ports, through which shipping patterns have become established over the years. Chicago has never asked the Commission to adjust inland freight rates to offset any competitive disadvantages it may have. But, by the same token, we assert that Chicago has a legal right to the preservation of its very important inherent advantage, that of location. If the Commission is allowed to deprive Chicago of that advantage by permitting rail carriers to equalize rates to competing ports for distances two, three, or more times as great as those to

Chicago, Chicago can never realize its full potential as a world port.[4]

There is no way the port of Chicago can protect its inherent advantage of location unless the Commission follows the correct interpretation of section 3(1) of the Act by holding that a discrimination which results from giving substantially more transportation for the same price is just as much a violation of section 3(1) as a discrimination which results from charging more for the same amount of transportation. If a port which is two or three times as far from the origin territory as is Chicago is entitled to the same export rates in cents per 100 pounds as Chicago, Chicago is placed at an unfair and unjust disadvantage because, under such a rate adjustment, the competitive ports have the opportunity to assert their advantages of established shipping patterns, well established port services, etc., but Chicago is denied the opportunity to assert its advantage of location.

The fallacy of the legal theory on which the Commission proceeded—that undue preference and prejudice cannot result from an equality of rates, even where, as here, the transportation services to the competing ports are widely disparate, but only from an inequality of rates—was exposed years ago.

The late Commissioner Eastman, in his dissenting-in-part opinion in *Dutton Lumber Corp.* v. *New York, N. H. & H. R. Co.*, 151 I.C.C. 391, 415 (1929), said:

> At the outset in considering the question thus presented, it may be well to devote brief attention to a curious doctrine which was not adopted by the ma-

[4] The Commission admits that it is depriving Chicago of "some of the benefits of its geographic advantage". (329 I.C.C. at 536; App. D, p. D-11)

> jority but which has adherents and was, indeed, here urged in behalf of the timber company. This doctrine is that there can be no undue prejudice where rates are the same, but only where they are different. This is equivalent, to use a simple illustration, to saying that if a grocer for 60 cents sells one dozen eggs to one customer and two dozen to another, he *does not* unfairly discriminate, but if he sells two dozen to one customer for $1.20 and two dozen to another for 60 cents, he *does* unfairly discriminate. It will be noted that in both instances he charges one customer 30 cents and the other 60 cents per dozen. Such reasoning condemns itself. Other things being equal, it is as unduly preferential to give one shipper twice as much transportation as another for the same charge as it is to give him the same amount at half the price.

Although the fallacy of the legal theory underlying the Commission's reports in this case would seem to be obvious, this Court has never directly passed on its validity. This theory was commented on by Mr. Justice Stone, in his dissenting opinion in *Texas & Pacific Ry. Co.* v. *United States,* 289 U.S. 627, 656, where he said:

> In holding that the Commission is without power to make the order, the Court does not deny that a discrimination which is produced by charging equal rates for unequal service is prohibited by the statute as much as one resulting from unequal rates for equal service.

And in *New York Central Railroad Co.* v. *United States,* 207 F. Supp. 483, 490 (S.D.N.Y., 1962), in which a section 3(1) order of the Commission was set aside for lack of adequate supporting findings, that court said:

> It is undeniable that unlawful discrimination can be effected as readily by giving more transportation for the same price as by charging a higher price for the same transportation.

The fallacy of the "curious doctrine" followed by the Commission has also been treated at some length in Sharfman, *The Interstate Commerce Commission*, Vol. III-B, pp. 554-559, where that author states:

> In connection with the tests of discrimination, it is first necessary to note that the standards of the third section can be violated by an equality of charges on related hauls, as well as by undue differences in charges. (p. 556)
>
> • • •
>
> *The test of preference or prejudice does not lie, then, in the elementary circumstance of whether rates are equal or unequal. The equality designed to be produced by equal rates, where unequal transportation services are involved, is the commercial equality of differently situated shippers—a consideration by which the Commission may not legally and should not economically be governed.* (p. 559) (Emphasis added)

The Commission, itself, in *City of Wilmington* v. *Alabama G.S.R. Co.*, 316 I.C.C. 709 (1962); 319 I.C.C. 620 (1963), held that it was unduly prejudicial to Wilmington, N.C., for the railroads to equalize export-import rates to Morehead City, N.C., with those to Wilmington, where distances to the former port exceeded those to the latter by more than 125 percent. Although appellants strongly relied on that decision in both petitions for reconsideration, the Commission does not mention it in its reports.[5] Why the Commission refused here to apply that rule, in accordance with a proper interpretation of section 3(1) of the Act, is unexplained.

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[5] The only mention of the *Wilmington* case occurs in the dissenting-in-part opinion of Commissioner Murphy, who points out the irrational discrepancy between the standard applied in the *Wilmington* case and the result reached here. (329 I.C.C. at 537; App. D., pp. D-12-13)

It is apparent, in view of the history of this litigation, that the port of Chicago will not be able to obtain export-import freight rate adjustments which properly reflect Chicago's advantage of location as long as the Commission is of the opinion that it may lawfully proceed on the legal theory that there is no undue prejudice where rates are equal, but only where they are unequal. Therefore, determination of the legal question here presented is of vital importance because resolution of that question will determine whether the port of Chicago has an enforceable right to the establishment of just, reasonable, and non-prejudicial inland export-import freight rates which properly recognize Chicago's advantage of location or whether the only course of action which appellants have is that of negotiation with the carriers for the purpose of obtaining the most favorable treatment that the carriers are willing voluntarily to accord the port of Chicago.

Resolution of this controversy over the proper interpretation of section 3(1) would also be of substantial importance to all ports. There has been much litigation concerning port relationships and an authoritative clarification of the fundamental legal principles to be followed in such cases is much to be desired. Furthermore, determination of the legal issues here involved is of particular importance to other Great Lakes ports which find themselves in much the same situation as is Chicago in their efforts to secure lawful and proper export-import inland freight rates. This is the first court test of the application of the Commission's arbitrary policy of port equalization to a Great Lakes port since the opening of the new St. Lawrence Seaway in 1959.

II.

The Commission has said many times, in non-port cases, with respect to both sections 1(5) and 3(1) of the Act, that a locality is entitled to have and to retain as against all other localities the benefits which naturally accrue to it by reason of its advantageous location.[6] The Commission conceded in the District Court that it has been employing different legal standards for determining preference and prejudice under section 3(1) depending on whether the involved rates are domestic or export rates. Whether the Commission may apply different rules in controversies between ports from those it employs in cases involving non-port localities is a substantial question of public importance on which this Court has never ruled.

The only justification the Commission has ever offered in support of applying different rules in the case of ports is found in its references to the 1935 amendment which added "port" and "port district" to section 3(1), following the decision in *Texas & Pacific Ry. Co.*, v. *United States*, 289 U.S. 627, in which this Court held that a port was not a "locality" within the meaning of that term as used in section 3(1). Up to that time the Commission had always considered a port to be a "locality" entitled to protection under section 3(1). Congress thereupon inserted the words "port" and "port district" in section 3(1), restoring to ports a forum in which to complain of undue preference and prejudice.

Referring to this amendment, the Commission here said (329 I.C.C. at 536; App. D, p. D-10):

> The amendment of section 3 of the act to include "ports" was intended to "afford competing ports a

[6] See, for example, the cases collected in Interstate Commerce Acts Annotated, sec. 1(5), n. 30.

> forum in which to complain of rate adjustments which tend to concentrate the movement of traffic through one or a limited number of ports and to deprive other ports of an opportunity to handle a part of such traffic'' and to ''encourage and promote the freedom of movement of export * * * commerce through the ports of the country.'' *Brazos River Harbor Nav. Dist.* v. *Abilene & S. Ry. Co.*, 322 I.C.C. 529, 534, sustained Sub Nom. *Atchison, T. & S. F. Ry. Co.* v. *United States*, 231 F. Supp. 422, 431.

The Commission interprets that amendment to confer on it power to require or permit port equalization without regard to substantial differences in distance which would prevent equalization in ''non-port'' cases.

Substantially all the debates and other legislative history of the 1935 amendment occurred in the Senate, but the Commission seizes on a portion of two sentences from a House Committee report, taken completely out of context, as justification for following a wholly arbitrary policy of port equalization. The 1935 amendment clearly does not confer on ports any special status under section 3(1) and it evinces no policy of port equalization. There is nothing in the legislative history which would suggest that the Commission was being given power to neutralize the distance advantages or disadvantages of competing ports. On the contrary, the legislative history clearly indicates that it was the intent of Congress that a port's advantage of location is to be recognized and preserved.[7]

The effect of the amendment was considered in *Boston and Maine Railroad* v. *United States*, 202 F. Supp. 830 (D. Mass., 1962), where the court set aside the Commission's order in *Equalization of Rates at North Atlantic Ports*, 311 I.C.C. 689 (1960), affirmed, without opinion, by an equally

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[7] See Appendix F for pertinent excerpts from the legislative history of the 1935 amendment.

divided court, *Baltimore & O. R. Co.* v. *Boston & M. R. Co.*, 373 U.S. 372. The court there said (202 F.Supp. at 836):

> Neither the legislative history nor the plain words of the amendment indicate that any change in the prevailing rules respecting undue preference and prejudice or any special treatment of ports and port districts was intended.

While this Court has never considered the meaning of the 1935 amendment, it has considered the meaning of a similar amendment, made in 1940, which added to section 3(1) the words "region, district, territory." Dealing with that amendment, in *New York* v. *United States*, 331 U.S. 284, 300, the Court said:

> Congress, by adding those words, made plain the duty of the Commission, in determining whether discriminatory practices exist, to consider the interests of regions, districts, and territories, and to eliminate territorial rate differences which are not justified by differences in territorial conditions. In other words Congress did not introduce a new standard of discrimination by its amendment to section 3(1); it merely made clear its purpose that regions, districts, and territories should be the beneficiaries of the law against discrimination.

Unless this Court makes it clear that the same reasoning is to apply in the case of the 1935 amendment, the Commission will continue to apply different rules in "port" cases than it applies in "non-port" cases under section 3(1). It is unfair and unlawful for the Commission to be permitted to deprive the port of Chicago of the benefit of its location in reliance on the 1935 amendment.

III.

If appellants are correct that the test of preference and prejudice does not lie in the equality or inequality of rates but rather in the propriety of the rate levels, relative transportation services considered, and that the same rules for determining preference and prejudice or relative reasonableness of rates which apply in non-port cases also apply in port cases, it can be easily demonstrated that the port of Chicago is entitled to export rates which give proper recognition to Chicago's advantage of location. The appellants established the existence of every element which is necessary to the relief which they seek. They established the unjustified disparity between the levels of the rates to Chicago and to the Gulf, relative transportation services considered, and the resulting injury to the port of Chicago. They likewise established the unreasonableness of the rates to Chicago in relation to those to competing ports. Relief was withheld, however, because of the Commission's erroneous construction of section 3(1) and section 1(5) of the Act.

While the courts cannot direct the Commission to establish any particular rates, it was unquestionably within the province of the District Court to decide what is the correct interpretation of the involved statutory provisions and to remand the case to the Commission with instructions to enter an order removing the unlawfulness in the present rates and establish rates which would be lawful in accordance with a proper interpretation of the Act. *Arrow Transportation Co.* v. *United States*, 176 F. Supp. 411, 421 (N.D. Ala., 1959), affirmed per curiam, 361 U.S. 353.

IV.

Title 5 U. S. C. § 706 provides:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law . . . [and] interpret . . . statutory provisions . . . .

It further provides that the reviewing court shall set aside Commission orders "not in accordance with law" as well as those which exceed the Commission's statutory authority or which fall "short of statutory right."

The questions of law here presented are obviously relevant to the controversy; they were properly presented both to the Commission and the District Court; and it is clear that their resolution is necessary to the decision, for this litigation can never be resolved until the matter of statutory interpretation is decided. Furthermore, the Commission has no statutory authority to follow an arbitrary policy of port equalization in the circumstances, but on the contrary the Commission's orders fall far short of the relief to which appellants are entitled based upon a correct interpretation of section 3(1). Section 706 of Title 5 clearly carries the requirement that reviewing courts shall interpret statutory provisions when the result of litigation turns thereon and that, when orders exceed the Commission's statutory authority or fall short of according a party his statutory rights, the reviewing courts shall define the limits of such authority or of such statutory rights.

This litigation is now in its sixth year, and the questions of law on which the case must turn have not been decided. It is of extreme importance to the future development of the port of Chicago that its rights to inland export-import freight rate adjustments be defined. If appellants' interpretation of section 3(1) is correct, they are entitled to

prompt relief. On the other hand, if appellants are in error and the port of Chicago must rely only on what the carriers are willing voluntarily to establish, appellants are also entitled to know that now. There is no reason why the decision of that question should be delayed another six years. To return this case to the Commission for further proceedings without guidance as to the legal issues, especially in view of the prior history of this litigation before the Commission, would settle nothing and would only impose upon the parties a needless burden of time and expense awaiting return of these legal questions to this Court.

What this Court said in *Mechling Barge Lines* v. *United States*, 376 U.S. 375, 386 is especially pertinent here:

> To require the parties to begin anew and thus spawn several cases, all of which might have been easily disposed of in the §4 proceedings, needlessly subjects appellants' claims to the rigors of circumlocution so deadly to effective administrative and judicial processes. This proceeding is now in its seventh year—during all of which period the rate under attack has been in force—and, still, basic questions as to the validity of the rate have not been considered by the Commission.

No purpose would be served by further administrative proceedings without resolution of the legal questions regarding the proper interpretation of section 3(1). Additional findings will not obviate the necessity for deciding those questions. This is not a case like *United States* v. *Chicago, M., St. P. & P. R.R.*, 294 U.S. 499 (1935), where this Court set aside an order of the Commission because its findings had not made clear the basis for the Commission's action. There is no problem here knowing what the basis

of the Commission's action was. The Commission's application of erroneous legal principles is apparent. The point here is that the Commission's action is not rational because it is based upon a misconstruction of the statute. Additional explanatory findings may be necessary where the Commission has not sufficiently articulated the basis for its action, but they cannot cure a misconstruction of the statute.

There can be no warrant for requiring appellants to go through another six years of useless and expensive litigation before these questions of law can again be presented to this Court. The District Court should have decided them. It would be entirely proper for this Court to vacate the judgment below and remand the cause to the District Court with directions to decide these questions of law. However, since these questions are so important not only to Chicago but to all ports that they must eventually be resolved by this Court, we respectfully submit that further delay would be unwarranted and that this Court should now consider and decide these questions of law after briefs on the merits and oral argument.

CONCLUSION

For the foregoing reasons, we submit that the questions presented are substantial and are of public importance and that the Court should note jurisdiction of this appeal; or, in the alternative, if the Court should believe that it is necessary or desirable that the District Court first pass on these questions, this Court should vacate the judgment of

the District Court and remand the cause to that court with instructions to decide the questions of law presented.

Respectfully submitted,

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February, 1969

APPENDIX A

[FILED JULY 25, 1968]

UNITED STATES DISTRICT COURT
Northern District Of Illinois—Eastern Division

CITY OF CHICAGO AND BOARD OF TRADE OF THE CITY OF CHICAGO, Plaintiffs,	)	
v.	)	66 C 524
UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, Defendants.	)	

Before SCHNACKENBERG, *Circuit Judge*, PERRY, *District Judge* and WILL, *District Judge*.

OPINION

WILL, *District Judge*. This is an action under the provisions of 28 U.S.C., sections 1336, 1398, 2284 and 2321-2325, and 5 U.S.C., section 1009, to set aside, annul, and permanently enjoin a report and order of the Interstate Commerce Commission (Commission), dated May 10, 1965, as amended, and a report and order dated March 13, 1967, both entered in a proceeding known as Docket No. 34348, *Board of Trade of the City of Chicago* v. *Illinois Central Railroad Company, et al.* The report and order of May 10, 1965 is reported at 325 I.C.C. 412, the order appearing on pages 421-422. The report and order of March 13, 1967 is reported at 329 I.C.C. 525, the order appearing on page 538.

At the time of the filing of the complaint before the Commission, the railroads who were defendants in the Com-

mission proceeding, intervening defendants here, maintained rates on soybeans to Chicago, when for export, from origins in central and southern Illinois which, relative transportation services considered, were approximately 150 per cent of the level of the rates on soybeans to Gulf ports, when for export, from the same origins. From some origins in Southern Illinois, the rates to Chicago were actually higher in cents per 100 pounds than the rates to New Orleans, although the distances to New Orleans from such origins averaged about two and one-half times those to Chicago. The complaint of the Board of Trade of the City of Chicago (hereinafter sometimes referred to, with respect to the Commission proceedings, as the "complainant"), in which the Department of the Port of the City of Chicago intervened in support of the complainant, alleged that the rates maintained by the railroad defendants were unjust and unreasonable in violation of section 1(5) of the Interstate Commerce Act (the Act),[1] and were unduly prejudicial to Chicago and unduly preferential of Gulf ports in violation of section 3(1) of the Act.[2]

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[1] Section 1(5) of the Interstate Commerce Act, 49 U.S.C. §1(5):

"All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

[2] Section 3(1) of the Interstate Commerce Act, 49 U.S.C. §3(1):

"It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever . . . "

This case arose before the Commission upon the complaint of the Board of Trade of the City of Chicago, alleging that export rail rates on soybeans from Illinois origins to Chicago are unjust and unreasonable in violation of Section 1 of the Act, and are unduly prejudicial to Chicago and unduly preferential of Gulf ports in violation of Section 3(1). Interested parties intervened in support of both the complainant and the railroads, and hearings were held before an examiner of the Commission.

In his recommended reports and order, the Commission examiner concluded that the existing rates had not been shown to be unjust and unreasonable, but recommended that such rates be held to result in undue preference and prejudice, both where the rate to Chicago was higher than that to the Gulf ports, and where it was lower.

On exceptions, Division 2 of the Commission agreed that complainant had failed to prove that the rates were unjust and unreasonable in violation of Section 1(5). In regard to Section 3(1), the Division concluded that the port of Chicago was entitled to rate parity with the Gulf ports, but had not shown that it was entitled to more favored rates. Accordingly, the Division held that undue prejudice to Chicago existed only where the rates were in fact higher than to the competing Gulf ports, and ordered the rates adjusted to eliminate the discriminatory treatment.

Petitions for reconsideration were denied by Division 2, acting as an Appellate Division, and a petition requesting that the case be found to involve an issue of general transportation importance was denied by the entire Commission. However, after the initial complaint had been filed with this Court, the Commission—with the consent of this Court—on its own motion reopened the proceeding for reconsideration on the existing record.

In its final decision, the entire Commission concluded that the rates had not been shown to be unjust and unreasonable, and that insofar as Chicago already enjoyed a rate advantage vis-a-vis the Gulf ports, complainant had failed to show that Chicago was under any undue prejudice. Any reduction in the rate to Chicago would, the Commission found, result in injury to the soybean processors located in central Illinois, putting them at a competitive disadvantage in foreign markets. The Commission further noted that under the rate level sought in the complaint, "the Gulf ports would be disadvantaged," and that this might well result in "creating a preferential situation in treating the one of which complaint is made" (329 I.C.C. at 535).

The relevant facts are that Illinois is the largest soybean producing state in the United States. Nearly one-fourth of the total national production emanates from Illinois. Seventy per cent of the Illinois production in turn is in central Illinois. The four railroads here involved serve 599 points of origin in central Illinois from which the average mileage to Chicago is 172 miles and the average mileage to New Orleans is 829 miles.

From the southernmost point of origin in Illinois, Cairo, the distance to Chicago is 365 miles and to New Orleans, 553 miles, the rate per hundredweight fixed by the Commission is 20.5¢ to both Chicago and New Orleans. From Marion, the respective distances are Chicago, 327 miles, New Orleans, 591 miles, and the rate fixed is 25.5¢ to both cities. Prior to the instant proceedings, the rate from Marion to Chicago was fixed at 36¢, that to New Orleans was, as it remains, 25.5¢. Centralia is 252 miles from Chicago, 666 miles from New Orleans, and the rate to both is 28.5¢. Prior to the Commission's action, the rate to Chi-

cago was fixed at 32.5¢ while the New Orleans rate was then as now, 28.5¢. Although Centralia is 113 miles closer to Chicago than Cairo, the rate from Centralia is 8¢ per hundred-weight higher than from Cairo. Centralia is 75 miles closer to Chicago than Marion, yet the rate is 3¢ per hundred-weight higher from the former. Decatur, which is 169 miles from Chicago and 749 miles from New Orleans, has been assigned a rate of 26.5¢ to Chicago and 38.5¢ to New Orleans. The same rates, 26.5¢ to Chicago and 38.5¢ to New Orleans, are provided for shipments from Champaign, 128 miles from Chicago and 790 miles from New Orleans; Gibson City, 110 miles from Chicago and 808 miles from New Orleans, and Gilman, 81 miles from Chicago and 837 miles from New Orleans. The most dramatic contrast in the rates is, of course, between Gilman to Chicago, a distance of 81 miles for which the rate is 26.5¢, or six cents more than the rate from Cairo to Chicago, a distance of 365 miles for which the rate is 20.5¢.

In contrast, the miles and rates to Chicago from points of origin generally north and west of those previously referred to are as follows: Pontiac, 106 miles, 15¢; Dixon, 114 miles 13.5¢; Rockford, 87 miles, 13.5¢; Freeport, 114 miles, 15¢.

It is apparent from the foregoing that the rates approved by the Commission have at best a very remote relationship to services and mileage involved. Unfortunately, the Commission in its reports and orders, while concluding that this rate structure was just and reasonable and did not result in any undue prejudice or disadvantage, failed to elucidate any formula, philosophy or findings on which these conclusions could rationally be based other than to conclude that Chicago was not competitively disadvantaged thereby.

Section 8(b) of the Administrative Procedure Act, 5 U.S.C. Sec. 1007(b), requires that

> "All decisions . . . shall . . . include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law or discretion presented on the record; . . ."

The Commission in its brief before this Court urges that the determination of whether a rate results in undue preference and prejudice is a complex fact question confided by Congress to the Commission for its determination on the record as a whole. With this general observation there can be no serious dispute and numerous decisions so hold.[3] Such a determination however, must be based on an understandable and identifiable rationale and not simply on some secret mystic divination or what the late Judge Frank once described by the coined phrase of "woosh-woosh."[4]

An examination of the Commission's performance here reveals how devoid of findings, criteria or other supporting rationale the approved rate structure is. At the outset, the Commission acknowledges, as it must, that the rates in question are not related primarily to distance and transportation services and asserts that these are not

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[3] *E.g.*, New York v. United States, 331 U.S. 284, 347 (1947); United States v. Chicago Trucking Co., 310 U.S. 344, 352-53 (1940); Swayne & Hoyt, Ltd. v. United States, 300 U.S. 297, 304 (1937); Pennsylvania Co. v. United States, 236 U.S. 351 (1915). *See, also,* Board of Trade of Kansas City v. United States, 314 U.S. 534, 546, 548 (1942).

[4] Old Colony Bondholders v. New York, N. H. & H. R. Co., 161 F.2d 413, 450 (2d Cir. 1947).

the only factors to be weighed in fixing rates, particularly export rates. It urges that, as a policy matter, rail rates should be fixed so as to encourage competition among various ports by giving shippers alternatives which are relatively cost-equal.

Plaintiffs deny that the Commission possesses any such export equalization authority and point out that, in any event, there must be some limit to this policy or rail rates to Chicago on cotton, sugar, crude oil and a host of other products produced primarily in areas other than the Middle West would have to be set low enough to enable Chicago to compete with Galveston, New Orleans, Mobile and other ports. The Commission in its findings and orders enunciates no formula or philosophy as to why the highly disparate rates here are necessary or even appropriate to encourage such competition.

It seems obvious that the competition between the ports of Chicago and New Orleans for soybean traffic must be affected by a number of factors other than rail rates. For example, the ultimate destination of the export shipments inevitably must be a factor. Soybeans or meal destined for Canadian customers are not likely to be shipped from New Orleans regardless of the rail rates and, conversely, shipments destined for South America or the Orient are not likely to depart through Chicago. Yet there is no analysis of this factor.

The record is barren of any evidence as to the basis for concluding that the rate pattern approved by the Commission will result in greater competition between the ports. Absent some information as to the other relevant factors, including destinations, shipping rates thereto, terminal costs, and the other cost elements which are necessary to complete the competitive picture, there is nothing to substantiate the Commission's conclusions except its naked expertise.

The Court acknowledges, of course, the limited scope of its power to review Commission determinations. Where adequate findings supported by substantial evidence upon the record as a whole are made by the Commission, a reviewing court must affirm.[5] Where, as here, the Commission finds that disparate rates are neither unreasonable or prejudicial, so long as the rate to Chicago is never greater than that to New Orleans, regardless of other factors, including other cost factors, quantities shipped from various points of origin, destinations, etc., it cannot be said that the finding is supported by substantial evidence.

The Commission does point out that more soybeans grown in Illinois are now shipped through Chicago than through Gulf ports. This can hardly be called substantial evidence in support of the Commission's findings since the rate structure would have to be unreasonable and prejudicial in the extreme if more Illinois grown soybeans and soybean products were shipped through Gulf ports, an average of 829 miles from Illinois points of origin, than were shipped through Chicago, an average of 127 miles therefrom.

There may very well be a sound economic basis for the rate structure approved by the Commission nothwithstanding its apparent irrationality. If there is, it does not appear in the Commission's findings and decisions.

The examiner found that the then existing rates had not been shown to be unjust and unreasonable but that they

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[5] *See, e.g.*, Illinois Central R.R. Co. v. Norfolk & Western Ry. Co., 385 U.S. 57, 69 (1966); Consolo v. Federal Maritime Comm'n., 383 U.S. 607, 618-21 (1966); Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 488 (1951); United States v. Pierce Auto Freight Lines, 327 U.S. 515, 536 (1946).

did result in undue preference and prejudice, both where the rate to Chicago was higher than that to the Gulf ports, even though distance and services were less, and also where it was lower.

Division 2 of the Commission agreed with the examiner that the rates had not been shown to be unjust and unreasonable in violation of section 1(5). In regard to section 3(1), the Division concluded that plaintiffs had established that the rates resulted in undue preference and prejudice only to the extent that they were higher to Chicago than to New Orleans.

Petitions for reconsideration were denied by Division 2, acting as an Appellate Division, and a petition requesting that the case be considered by the entire Commission as one involving an issue of general transportation was denied. After this action was filed, however, the entire Commission on its own motion and with the Court's approval, reopened the proceeding for reconsideration on the existing record and affirmed the conclusions of Division 2. It concluded without supporting findings that any further reduction in the rates to Chicago would be disadvantageous to the Gulf ports and would result in injury to soybean processors located in central Illinois by putting them at a competitive disadvantage with processors in foreign countries.

The latter conclusion is particularly interesting and illustrates the complicated economic thicket through which one must make his way if railroad rates are to be used as protective weapons in foreign trade. The contention of the processors is that if rates on soybeans are reduced it will enable foreign processors to buy the whole beans and process them at a cost which will make soybean oil and meal cheaper in the foreign markets than it now is when

processed in the United States and shipped in processed form.

It is obvious that a whole host of factors quite apart from rail rates on whole soybeans are necessarily involved in any such conclusion. Rail rates on soybean oil and meal will determine in part the delivered cost in foreign markets of the processed products. Relative shipping rates, terminal costs and other relevant costs on whole soybeans, meal and oil are equally pertinent. Present profit margins of the central Illinois processors are certainly relevant, since the Commission should not be fixing rail rates so as to assure an excessive price and profit.

Yet, no findings with respect to these factors were made by the Commission in support of its conclusion that lower rates to Chicago would prejudice central Illinois processors and were therefore unwarranted.

While the Commission undoubtedly has authority to fix rates, taking into consideration other factors than transportation services involved, this case illustrates nicely the complexities inherent in considerations of equalization, competition, protection of domestic as against foreign manufacturers or processors, etc. Similarly, the effect of other forms of competing transportation services may be relevant. If the Commission determines it has authority to consider and that the particular rates require consideration of these added factors, then it must make findings, elucidate its analysis, and make understandable the justification for rates as widely disparate in relation to services as are those here involved and not simply "woosh-woosh," the conclusion that they are reasonable and just and neither unduly preferential nor prejudicial.

Both sides have vigorously argued the question of whether equality of rates automatically obviate undue preference and prejudice under Section 3(1) of the Act as

amended, the plaintiffs contending that equal rates for unequal services may be just as discriminatory and prejudicial as the converse, unequal rates for equal services. The defendants assert that by the 1935 amendment to Section 3(1), Congress intended to authorize the Commission to fix equal rates for unequal services where ports of export are involved.

While we conclude that the Commission has failed to make adequate findings and that the case must therefore be returned to it for further proceedings consistent with the views expressed herein, the questions of whether the Commission has authority to fix rates so as to protect domestic processors against foreign competition, or to fix equal rates for unequal services where transportation to ports of export is involved, are not here decided. Nor do we decide whether simple equality of rates without regard to services precludes undue preference or prejudice under Section 3(1) of the Act.

We hold solely that on the record before us, the Commission has failed to make adequate findings to justify the conclusion that, as the dissenting opinion of Commissioner Murphy points out, rates involving as much as a 270% differential between Chicago and New Orleans are reasonable in the light of all relevant factors and not unduly preferential or prejudicial. The case is remanded to the Interstate Commerce Commission for further proceedings consistent herewith.

SCHNACKENBERG, *Circuit Judge*, concurring.

Whether intended by the Commission or not, the order of the Interstate Commerce Commission imposes an unjust limitation on the successful operation of the international seaport of Chicago.

PERRY, *District Judge*.

I concur in the result and agree that the case should be remanded to the Interstate Commerce Commission for more specific findings.

APPENDIX B

[FILED JULY 25, 1968]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CITY OF CHICAGO AND BOARD OF TRADE OF THE CITY OF CHICAGO, Plaintiffs,	)	
v.	)	66 C 524
UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, Defendants.	)	

JUDGMENT ORDER

The above cause came on regularly for hearing before the Court on the 11th day of January, 1968, and was duly submitted for consideration and decision, and the Court on the 24th of June, 1968, made its decision and entered its opinion. Now, therefore, pursuant thereto, it is hereby

ORDERED AND ADJUDGED that the Interstate Commerce Commission's orders of May 10, 1965 and March 13, 1967, are vacated and set aside, and the cause is remanded to the Commission for further proceedings consistent with the opinion this day entered.

Dated at Chicago, Illinois, this 25th day of July, 1968.

Elmer J. Schnackenberg
Elmer J. Schnackenberg
Circuit Judge, United States
Court of Appeals for the
Seventh Circuit
Joseph Samuel Perry
Joseph Samuel Perry
United States District Judge
Northern District of Illinois
Hubert L. Will
Hubert L. Will
United States District Judge
Northern District of Illinois

APPENDIX C

[325 I.C.C. 412]

INTERSTATE COMMERCE COMMISSION

[412] No. 34348

BOARD OF TRADE OF THE CITY OF CHICAGO v. ILLINOIS CENTRAL RAILROAD COMPANY, ET AL.

Decided May 10, 1965

Carload rates on soybeans from Illinois origins to Chicago, Ill., for export found not shown to be unjust, unreasonable, or in contravention of the policy stated in section 3(1a) of the Interstate Commerce Act, but found unduly prejudicial to the port of Chicago and unduly preferential of Gulf ports to the extent that they exceed the rates to the latter ports. Undue preference and prejudice ordered removed.

John S. Haeussler, Richard J. Hardy, Carl J. Lessing, Frank E. Polom, and *Harold E. Spencer* for complainant.

Gerald E. Franzen, Norman Kern, Mathias M. Mattern, Arthur J. Maurer, and *Ronald A. Parizek* for interveners in support of complainant.

John W. Adams, E. A. Brautigam, John H. Doeringer, Robert H. Duesenberg, James H. Durkin, W. J. Edwards III, P. C. Mullen, William J. O'Brien, Jr. and *Archie T. Walters* for defendants.

Thomas C. Adam, Dwight K. Ball, Robert F. Daily, L. F. Daspit, John B. Deininger, R. E. Harridge, H. N. Johnson, A. E. Leitherer, E. B. McKinney, W. C. McLaughlin, Louis A. Schwartz, R. L. Sprunger, Gerald E. Stitt, and *William H. Towle* for interveners in support of defendants.

REPORT AND ORDER OF THE COMMISSION

DIVISION 2, COMMISSIONERS FREAS, GOFF, AND TIERNEY

FREAS, *Commissioner:*

By complaint filed on October 23, 1963, the Board of Trade of the city of Chicago alleges that the local and joint

rates[1] maintained by defendants[2] on soybeans, in carloads, [413] from Illinois origins to Chicago, Ill., when for export, are unjust and unreasonable in violation of section 1 of the Interstate Commerce Act, unduly prejudicial to the port of Chicago and unduly preferential of Gulf ports in violation of section 3(1) of the act, and in violation of the policy of Congress stated in section 3(1a) of the act. Complainant seeks an order requiring defendants to discontinue the alleged violations and to establish and maintain in the future lawful export rates on soybeans. The complainant requests that specific export rates to Chicago be prescribed at a maximum level equal to 9 percent of the corresponding docket 28300 first-class rates.[3]

Rice Grain Corporation, which operates a terminal grain elevator in the Chicago switching district and is engaged in the merchandising and export of soybeans, intervened in support of complainant, as did the Chicago Association of Commerce and Industry, and the Department of the Port of Chicago. Interveners supporting defendants are the New Orleans Traffic and Transportation Bureau and seven companies[4] operating soybean processing plants in central Illinois.

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[1] Rates are stated in cents per 100 pounds.

[2] Illinois Central Railroad Company (IC), Gulf, Mobile and Ohio Railroad Company (GM&O), Wabash Railroad Company (Wabash), and Chicago & Eastern Illinois Railroad Company (C&EI).

[3] Unless otherwise indicated, the first-class rates referred to herein are those prescribed in *Class Rate Investigation, 1939*, 262 I.C.C. 447, and later reports, as modified by subsequent general increases.

[4] Allied Mills, Inc., Archer Daniels Midland Co., Central Soya Co., Inc., Lauhoff Grain Co., Ralston Purina Co., A. E. Staley Manufacturing Co., and Swift & Co.

Exceptions to the recommended report and order of the examiner and replies thereto were filed by the complainant, the defendants, and certain of the interveners in support of the defendants. Our conclusions differ in degree from those recommended by the examiner, who, as more fully explained hereinafter, found undue preference and prejudice but no showing of unlawfulness in other respects.

The facts of record are not in serious dispute. We adopt the examiner's statement thereof. Pertinent portions of his report, including the lettered appendixes thereto, are attached as the appendix to this report. A brief statement of the factual situation is given below.

The assailed rates to Chicago are generally lower from northern and central Illinois origins than the rates therefrom on soybeans to the Gulf ports for export. The assailed rates to Chicago from various origins in the southern portion of Illinois are higher than those on movements to the Gulf ports. These situations are illustrated in the appendix.

[414] Soybeans and soybean products were the leading "cash" dollar earner of all United States farm products exported in the 1962-63 crop year. Soybeans and soybean meal, exported at competitive prices, are in demand on the world market. This demand absorbs all the soybeans not being purchased by the domestic crushing industry and all the soybean meal not consumed in this country. Major customers have been the fast-growing commercial feed industries of Western Europe and Japan. Approximately 27 percent of the soybeans, 13 percent of the soybean meal, and 23 percent of the soybean oil produced in the United States were exported.

Production of soybeans in the United States, increasing each year, reached 675 million bushels in 1962, of which

Illinois, Indiana, and Iowa produced 159 million, 77 million, and 92 million bushels, respectively. In Illinois soybeans are grown throughout most of the State. In 1962, approximately 76 percent of its total was produced in the five crop-reporting districts in central Illinois, while the remainder was divided about equally between northern and southern Illinois, each with two crop-reporting districts. Approximately 70 percent of Illinois soybeans are grown within 60 miles of the Illinois River.

Statistics of the movement of soybeans to Chicago for the years 1960 through 1963 are of record, and shipments of soybeans from Chicago for the same years were tabulated by the various modes of transportation, as shown in the appendix. Exports via the Great Lakes and St. Lawrence Seaway rose to 16 million bushels in 1963. With 10 deep-water grain elevators having a total capacity in excess of 57 million bushels, the ability of the port of Chicago to handle increased exports is unquestioned. Rail shipments from Chicago, which totaled 7 million bushels in 1963, were consigned primarily to domestic soybean processors in Illinois and Indiana.

Rice Grain Corporation purchases soybeans in central Illinois for movement to Chicago by barge, but because of the level of the assailed rates it is uneconomic to purchase soybeans in that area for rail shipment to Chicago. On the other hand, it does purchase corn in central Illinois which is moved to Chicago at competitive rail rates.

The seven intervening soybean processors, with plants in central Illinois, show that central Illinois has a total plant processing capacity of 131 million bushels a year compared with production in the 1962-63 crop year of 121 million bushels. Interveners estimate that from all soybean growing areas in Illinois processing capacity

[415] exceeds production capacity by 39 million bushels annually. Of this total 5 million bushels are required for seed and 25 million bushels for export. Because of this spread between soybean production and processing capacity, it has been necessary for processors to procure soybeans from Indiana and Iowa, and also from southern Illinois.[5] Of the 19 million bushels produced in southern Illinois, only 1 million bushels are used by central Illinois processors. These interveners are apprehensive that if the rates to Chicago for export are reduced, as sought by complainant, Chicago soybean dealers would then be in position to bid aggressively on central Illinois soybeans, with the result that interveners would have to increase their already high bids in order to obtain adequate supplies to continue operations. They also point out that they are in competition with foreign processors who also use American soybeans. They fear that they would be placed at a competitive disadvantage in foreign markets if the export rates on soybeans should be reduced below a level equivalent to their composite transportation costs of moving soybeans to their plants and the resulting products, soybean meal and soybean oil, to Chicago.

The examiner found the assailed rates not shown to be unjust, unreasonable, or in contravention of the policy stated in section 3(1a) of the act, but that certain of the rates, to the extent that they reflect a higher percenage of docket 28300 first-class rates than do export rates to the Gulf, are unduly prejudicial to the port of Chicago and unduly preferential of the Gulf ports. The finding that the assailed rates are not shown to be unjust or unrea-

[5] Movements of soybeans in both directions between central and northern Illinois points (other than Chicago) are offsetting.

sonable reflected his conclusions that the "relative unreasonableness" urged by the complainant finds substance only under section 3(1), and that complainant's evidence that tends to show the assailed rates exceed fully distributed costs does not demonstrate unreasonableness under section 1. With respect to section 3(1a), in which Congress declares that shippers of farm commodities shall be granted export rates on the same principles as apply to such rates on industrial products, the complainant seeks export rates on soybeans no higher than those on soybean meal. The examiner concluded that there was no difference in the treatment accorded these commodities. His findings of violation under section 3(1) were premised upon various comparisons placed in evidence by the complainant, particularly those concerning fully distributed costs, car-mile earnings, and the docket 28300 scale of rates.

[416] In addition to attacking the examiner's findings under sections 1 and 3(1a) which found that certain rate comparisons did not afford a proper standard of reasonableness, the complainant argues that he erred in holding that the accuracy of out-of-pocket cost data submitted by the defendants is not open to question; that his treatment of the reduction in the rate on soybeans from central Illinois to the Gulf ports was inconsistent; and that his citation of *Bunge Corp.* v. *Ann Arbor R. Co.*, 283 I.C.C. 617, 626, was inappropriate.

According to the complainant, the witness presenting the out-of-pocket cost evidence was not cross-examined because the nature of the study upon which the costs were based was not explained. Several Commission decisions are cited for the proposition that unsubstantiated evidence is entitled to no weight. The examiner merely stated that, in view of the stipulation, the accuracy of the out-of-pocket

costs as calculated by the witness is not subject to question and the compensativeness of the rates is not in doubt. He further stated that the costs so developed could not be presumed to bear a close relationship to out-of-pocket costs as determined by Rail Form A procedures. We see no error on the part of the examiner on these points. The rate on soybeans from central Illinois to the Gulf ports was reduced for reasons not here pertinent, and therefore, as concluded by the examiner, it is of no value as a comparison under section 1. The principle for which the *Bunge* case was cited, that it is immaterial that the rail rates on soybeans exceed those on soybean meal or on corn, is not controlling herein for the reason that in that case there was a lack of evidence for an affirmative finding under section 3(1a).

The complainant's evidence and contentions concerning allegations under sections 1 and 3(1a) of the act were adequately dealt with in the respective portions of the examiner's report contained in the appendix hereto. The exceptions with respect to those matters, other than those discussed above, raise no arguments of merit which were not covered by the examiner, and we adopt his findings as our own.

Exceptions by the defendants and their supporting interveners are directed to the examiner's findings of violation under section 3(1) of the act. The defendants contend that docket 28300 first-class rate scales are inappropriate for comparative purposes here, since they were not prescribed for application on such export traffic and the [417] rates on soybeans are made on entirely different premises. They point out that the present rates from northern and central Illinois to Chicago are lower than are the rates to the Gulf ports, and they contend that Chicago

is not unduly prejudiced so long as it has at least rate parity from the major producing area of Illinois. They state that the examiner's findings would increase the advantage to Chicago and that the three standards of comparison he used (comparison with docket 28300 first-class, car-mile earnings, and fully distributed costs) are erroneous. No harm to Chicago has been shown, according to the defendants, since more soybeans are moving from Illinois to Chicago than to the Gulf ports with movements from central Illinois to the latter generally being much less. Because the capacity of soybean processors in central Illinois exceeds production there, and large quantities of soybeans move by water to Chicago and to the Gulf ports, the defendants contend the rail rates do not necessarily control movements. Defendants contend that processors in Illinois even purchase soybeans in the Chicago market, and that it has not been shown that lower rail rates to Chicago would increase the movement of soybeans thereto. These matters will be considered in our discussion below.

The defendants take exception to the examiner's statement that the burden of proof had shifted to them after the complainant had established the existence of some rates higher in amount to Chicago than to Gulf ports, and to his holding that they had not met that burden through evidence of a difference in transportation circumstances. Reasons for the pertinent rate changes were given in the defendants' evidence, the important factor generally being the rate levels of other carriers. In order to settle a complaint filed by shippers in dockets No. 34119 and 34119 (Sub-No. 1), a rate of 38.5 cents from central Illinois was established to the Gulf ports which equalized the rates with those to certain Atlantic ports served by eastern railroads. The rates on soybeans to the Gulf ports from southern Illinois were made at a level to meet specific regulated

and unregulated barge competition. *Export Soybeans, Southwest and South to Gulf Ports*, 309 I.C.C. 445. Those from Illinois River origins to Chicago were established to meet truck and barge competition. Several of the defendants reduced rates from certain northern Illinois origins located at distances that are generally up to 100 miles to meet short-haul truck competition. Rail rates on soybean meal were also reduced to meet competition. *Volume Rates on Processed Meal—Midwest to Ports*, 322 I.C.C. 456. *Vegetable Cake* [418] *and Meal, I.F.A., S.F.A., S.W.L., and W.T.L. Ter.*, 310 I.C.C. 157. We have held that rate reductions to meet intermodal competition are within the carriers' managerial discretion and need not be extended to all other points, *Tovrea Packing Co.* v. *Atchison, T. & S. F. Ry. Co.*, 197 I.C.C. 494, 498, and *Westbound Rates on Meats*, 210 I.C.C. 13, 47, and that the failure to do so does not *ipso facto* constitute undue preference or prejudice, *Walter Brewing Co.* v. *Union Pac. R. Co.*, 225 I.C.C. 760, 763, and *Consolidated Southwestern Cases*, 188 I.C.C. 307. Further, the burden of proof remains with the complainant where rates below parity are sought, and most of the assailed rates to Chicago presently are already lower than the rates to the Gulf ports. In instances where the rates to Chicago are higher than those to the Gulf, it is, as held by the examiner, incumbent upon the defendants to justify the rate differences. See *Continental Steel Corp.* v. *New York, C. & St. L. R. Co.*, 256 I.C.C. 167, 174. This their evidence does not accomplish, as indicated in the discussion below.

The defendants except to the use of the regional average terminal costs for Chicago rather than the actual switching costs and absorptions therefor, and to the examiner's characterization of the latter as a divisional agreement. They also question his use of the complainant's fully distributed costs, based on regional averages, rather than the specific out-of-pocket costs presented by the defendants.

A witness for the defendants restated the complainant's cost evidence with adjustments for terminal costs at Chicago and use of average weight trains. Regardless of whether we consider complainant's fully distributed cost evidence or that presented by the C&EI on a fully distributed basis or that of the IC on an out-of-pocket basis, it is clear that the assailed rates to Chicago are generally above fully distributed costs while the barge-compelled rates to the Gulf ports generally are somewhat below these costs. Our findings herein, however, are based primarily on factors other than costs.

The New Orleans Traffic and Transportation Bureau excepts to the examiner's finding under section 3(1) on the ground that a mere difference in rates or in distance does not constitute undue prejudice, citing *Bags and Bagging from New Orleans, La., to Oklahoma,* 225 I.C.C. 320, 329, and contends that Chicago's geographical advantage is generally reflected in the assailed rates. *American Colloid Co.* v. *Akron, C. & Y. R. Co.*, 321 I.C.C. 91, is cited to show rejection of mile-for-mile comparisons in favor of a comparison of total charges. These contentions will be taken **[419]** into consideration below. This intervenor agrees that the rates to Chicago from points in central Illinois east of East St. Louis should be no higher than those to Gulf ports, but it requests a finding that the Gulf ports are prejudiced where there are lower rates to Chicago from origins in northern and central Illinois for export. However, the record provides no basis for such a finding in this proceeding.

The intervening processors also except to the examiner's conclusion that soybean marketing factors are not relevant under section 3(1). They maintain that the marketing evi-

dence, particularly the competitive bidding of central Illinois processors, refutes any conclusion that a disparity in rail rates as between Chicago and New Orleans has prevented Chicago dealers from purchasing large quantities of soybeans in Illinois. A witness for the complainant knew of no shortage of soybeans in Chicago, and the processors assert that there is a surplus. They also point out that Chicago has available the same 38.5-cent rate from central Illinois origins as do the Gulf ports when movement beyond Chicago is to Baltimore for export, although no such shipments were shown. They take exception to the examiner's failure to accord greater weight to the holdings *in Volume Rates on Processed Meal—Midwest to Ports, supra,* concerning the position of domestic processors in world trade, contending that the examiner's findings would recreate the circumstances corrected by that decision. Exception is taken to the examiner's conclusion that the existing rates, even though lower to Chicago from the major producing areas in Illinois, have not been justified, and they urge that it has been shown that the Gulf ports enjoy no preference vis-a-vis Chicago. These matters will be considered in our discussion below.

The processors note that the examiner discussed the range of the composite costs of soybean products, rather than the averages thereof, in showing the extent to which the existing soybean rates are comparable to the transportation costs for products. (See the appendix hereto.) They except to his conclusion that this is not a proper basis for holding against the complainant. We agree with the examiner's conclusion that the lawfulness of the assailed rates to Chicago may not be measured by a comparison of the inbound rate on soybeans to a processing plant plus the outbound charges to Chicago on the resulting product.

The rates on soybeans are similar to those on grains on which, characteristically, the rates are on a parity to competitive markets or ports. See *Southeastern Assn. of* [420] *R. & Util. Commrs.* v. *A. T. & S. F. Ry.*, 321 I.C.C. 519, 521-523, 560. The reason for this is that competition in the trade is so keen that a slight rate difference will determine which market or port will receive the shipments involved. Compare *Wheat and Flour, Midwest & S. W. To Gulf-Chicago—Export*, 322 I.C.C. 581. There is evidence here that a difference in bidding of one quarter of a cent per bushel of soybeans would have made the 7 million bushels, shipped by rail in 1963 from Chicago for domestic use, available for export. As stated, competitive transportation is available for movements to both Chicago and the Gulf ports. Insofar as the Gulf ports are concerned, the competition defendants must meet is chiefly from unregulated barge competition as noted in *Export Soybeans, Southwest and South to Gulf Ports, supra.* To Chicago the truck-compelled rates for the shorter distances are in some instances at about the same level as the barge-compelled rates in the abovementioned proceeding. The evidence indicates that some of the rates to Chicago have not been affected by competitive transportation. Although the record does not indicate the intensity of the truck and barge competition to Chicago, the fact that certain rates have been reduced by the defendants to meet other forms of competition is an indication that transportation conditions and circumstances are not so dissimilar as to warrant a difference in amounts of the rates. The defendants are in control of the rail rates to the involved ports, and Chicago is entitled to rates on soybeans for export from Illinois origins no higher in amount than those to the Gulf ports. Other factors, such as proximity and market demands, may justify lower rates to one port than another, as here there

are numerous lower rates on soybeans from northern and central Illinois to Chicago than to the Gulf ports, but no such justification exists for the lower rates from the southern portions of Illinois to the Gulf ports than to Chicago.

Here, as stated, the complainant is asking for more than rate parity, and it introduced comparisons with this in mind: that is, comparisons of the assailed rates with those on corn; rates on soybeans with those on soybean meal; and the involved rates with fully distributed costs, with earnings per car-mile, and with the docket 28300 scale. While the record permits the conclusion that a finding of parity is justified, the aforementioned comparisons fail to demonstrate a lawful basis for the establishment of rates lower than parity. To a large extent, the comparisons involve unlikes, and ignore differences in competitive conditions. We may not infer the existence of some ap- [421] parent or measurable detriment in such circumstances. The evidence indicates that Chicago receives substantially more soybeans from all Illinois origins as a whole than do the Gulf ports. Because so many processing plants are located in central Illinois and because of Illinois River barge-truck competition, soybeans do not move in great quantities by rail from these origins to either Chicago or the Gulf. The port of Chicago receives some 14.6 million bushels of soybeans via rail, 13.2 million by truck, 11.3 million by barge and 902,000 via the Great Lakes. Neither the port nor the merchants have established any injury which can be attributed to the existing level of the rail rates. There is no question but that sharp competition exists on soybean traffic. Without more complete evidence, however, it has not been established, and we cannot therefore find, that the port of Chicago presently does not compete effectively with the Gulf ports. There-

fore, whatever disadvantage may exist as to the port of Chicago at a parity of rates with the Gulf ports has not been shown to be undue in violation of section 3(1) of the act.

We find that the assailed rates on soybeans, in carloads, from Illinois origins to Chicago for export have not been shown to be unjust or unreasonable, or to contravene the policy stated in section 3(1a) of the act.

We further find that the assailed rates on soybeans from Illinois origins to the port of Chicago for export that are higher than the corresponding export rates on soybeans from the same origins to the Gulf ports are unduly preferential of the Gulf ports and unduly prejudicial to Chicago. In all other respects the assailed rates have not been shown to be unduly preferential or prejudicial.

It is ordered, That the defendants named in the complaint, to the extent that they participate in the transportation, be, and they are hereby, notified and required to cease and desist from practicing the undue preference and prejudice found to exist on or before July 26, 1965.

It is further ordered, That said defendants be, and they are hereby notified and required to establish on or before July 26, 1965, upon not less than 30 days' notice to this Commission and to the general public by filing and posting in the manner prescribed by this Commission under section 6 of the Interstate Commerce Act, and thereafter to maintain and apply rates which will prevent and avoid the undue preference and prejudice found herein to exist.

[422] *And it is further ordered,* That this order shall remain in effect until further order of the Commission.

By the Commission, division 2.

BERTHA F. ARMES,
Acting Secretary.

(SEAL)

APPENDIX

Pertinent portions of the report recommended by Hearing Examiner Walter D. Matson

Comparison of export rate on soybeans from Springfield, Ill. to Chicago with composite equivalent cost per 100 pounds on soybean meal and oil manufactured in transit at Decatur, Ill.

	Rate	Charges
Rail rate on soybeans, Springfield to Decatur (100,000 pounds)	9	$90.00
Soybean meal, Decatur to Chicago (80,000 lbs.):		
Through rate, Springfield to Chicago	24.5	———
Transit balance, beyond Decatur	15.5	124.00
Soybean oil, Decatur to Chicago (20,000 lbs.)	25.5	51.00
Total through charges	———	265.00
Composite equivalent cost per 100 lbs	26.5	———
Export rate on soybeans, Springfield to Chicago	26.5	———

In the above example it is reasonably assumed that 100,000 pounds of soybeans will be converted into 80,000 pounds of soybean meal and 20,000 pounds of soybean oil. It will be noted that the composite equivalent cost so computed is exactly the same as the present rate on soybeans from Springfield to Chicago. If the rate on soybeans for export should be reduced to 18 cents as sought by complainant the resulting spread of 8.5 cents between the composite cost and the export rate, it is contended, would favor the export of soybeans instead of the products. The above example, from interveners' brief, is the only one of record in which there is exact parity between the computed composite cost and the existing soybean rate. In the 91 other examples given in interveners' exhibits the situation varies. From 29 C&EI origins the soybean rates exceed the composite costs in 10 instances by from 2.9 to 5.3 cents and in 19 instances are lower by from 2.9 to 5.4 cents. From 29 IC origins other than Springfield the

soybean rates exceed the composite costs in 25 instances by from 0.8 to 3.4 cents and are lower in 4 instances by from 2.2 to 2.7 cents. From 33 Wabash origins the soybean rates exceed the composite costs in 21 instances by from 0.1 to 2.8 cents and lower in 12 instances by from 0.1 to **[423]** 0.9 cents. No illustrations are given for GM&O origins, as such. On the other hand, from central Illinois origins to New Orleans, the export rates on soybeans are all lower than the composite costs similarly computed by from 2.1 to 14.9 cents.

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Section 1.—To Chicago from 133 specific Illinois key points (and from directly intermediate points) rates on grain were prescribed in 1936 in *Grain and Grain Products,* 215 I.C.C. 83, 103-105. From most of these origins defendants' present rates on soybeans reflect the basic level of rates so prescribed for grain[1] plus the general increases subsequently authorized for grain.[2] Substantially lower rates to Chicago, induced by truck and barge competition, are maintained by the Wabash, GM&O, and C&EI from points within 87 miles, 98 miles, and 125 miles, respectively, and lying to the south and southwest of Chicago. The IC maintains similarly depressed rates from points in northern Illinois as far west as Freeport and south thereof as far as Wenona (114 and 139 miles, respectively, from Chicago). The present rates (excluding the truck-barge competitive rates) from 27 Wabash, 15 GM&O, 16 C&EI, and 37 IC representative origins reflect averages of 14.6, 14.3, 14.0, and 14.6 percent, respectively, of the current docket 28300 first-class rates; and from all such points

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[1] In the prior report soy seeds or soybeans were regarded as field seeds; and findings previously made relating thereto were rescinded. *Grain and Grain Products,* 205 I.C.C. 301, 469-470.

[2] Higher general increases were authorized for soybeans in some proceedings. See *B. C. Christopher & Co.* v. *Atchison, T. & S. F. Ry. Co.,* 296 I.C.C. 327, 328-329.

the overall average is 14.4 percent. As stated by the GM&O witness, the truck-barge competitive rates of that defendant reflect from 7 to 10.5 percent of the current docket 28300 first-class rates; and such rates of the other defendants are on approximately the same level.[3]

In appendix A hereto for representative movements are tabulated, among other things, the grain rate prescribed in 1936, the present soybean rate, the corresponding current first-class rate, the percentage relationship of the present rate to the first-class rate; and the rate sought by complainant, which reflects 9 percent of the first-class rate. The movement from Decatur, in the heart of the heavy soybean producing region of central Illinois, will serve as a basic illustration of the general adjustment. In *Grain and Grain Products, supra,* a specific local rate of 11.5 cents was prescribed on grain from Decatur and the same rate was blanketed over a group extending from 60 to 185 miles from Chicago. Defendants then voluntarily applied that rate to soybeans. The present rate of 26.5 cents, which includes only the subsequent general increases authorized for grain, reflects 13.5 percent of the first-class rate. The 18-cent rate sought, reflecting 9 percent of the first-class rate, would mean a reduction of approximately one-third. Adoption of the 9 percent basis would require somewhat smaller reductions in the majority of the present truck-barge competitive rates; however, from Mazonia and sev- **[424]** eral other points the present rates are already at or below the 9-percent basis, which, if prescribed as a maximum, would necessitate no change.

Complainant's argument that the assailed rates maintained by defendants on soybeans from Illinois origins to Chicago when for export are unjust and unreasonable in

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[3] The truck-barge competitive rates of the Wabash are not graded, as are the others, but are blanketed at 16 cents from all stations from Wing northward to Alpine, respectively 87 miles and about 25 miles from Chicago. The 16-cent rate reflects 10.3 percent of the first-class rate from Wing and higher percentages for the shorter distances.

violation of section 1 of the act relates mainly to the concept of "relative reasonableness." Thus, complainant urges for consideration that the level of the assailed rates is approximately 150 percent of the level of export soybean rates maintained by defendants to Gulf ports; that the assailed soybean rates exceed on the average by 22 percent defendants' export soybean meal rates to Chicago, while to New Orleans, La., defendants' export rates on soybean meal average 17 percent higher than those on soybeans; that the assailed rates exceed defendants' fully distributed costs of performing the transportation, whereas their soybean rates to New Orleans are below such costs; that the car-mile earnings at the assailed rates greatly exceed the car-mile earnings produced by defendants' soybean rates to New Orleans; that the assailed rates of defendants IC and GM&O are higher for shorter distances than export rates maintained by those defendants on soybeans to Gulf ports from origins in Kentucky, Tennessee, and Mississippi; that the assailed rates of defendant C&EI substantially exceed that defendant's rates on corn from the same Illinois origins to Chicago; and that the comparisons with rates on soybean meal are particularly compelling because those rates cover extensive transit and back-haul privileges not extended on soybeans moved to Chicago for export.

Adverting to the rate comparisons advanced by complainant, defendants contend that the compared rates do not provide a valid measure of the maximum reasonableness of the assailed rates, because in each instance the compared rates are depressed below a maximum reasonable level; and defendants' evidence supports this contention. Reference has been made above to the truck-barge competitive rates on soybeans from certain Illinois origins to Chicago. The compared rates on soybean meal to Chicago were instituted by defendants in 1959 as part of a widespread truck-competitive adjustment in rates on various vegetable meals and reflect a level below the maximum prescribed in *Cottonseed, its Products, and Related Articles,* 188 I.C.C. 605, as modified by subsequent general

increases. The compared rates on soybeans from points in southern Illinois, Kentucky, Tennessee, and Mississippi to Gulf ports are reduced barge-competitive rates approved in *Export Soybeans, Southwest and South to Gulf Ports,* 309 I.C.C. 445. The compared soybean rates from central and northern Illinois points to Gulf ports for export were voluntarily reduced by defendants in 1963 to the level of export rates to Baltimore, Md., and Hampton Roads, Va., instituted by eastern railroads in 1959. It is well settled that rates depressed by intermodal competition do not constitute an acceptable standard of maximum reasonableness. *American Crystal Sugar Co.* v. *Chicago, M., St.P. & P. R. Co.*, 305 I.C.C. 407, 411; *Colorado Portland Cement Co.* v. *Apache Ry. Co.*, 258 I.C.C. 248, 250. Similarly, rates reduced to equalize one port with another may not be accepted as evidence that rates to a third but unrelated port are unreasonable. See *G. F. Heublein & Bros., Inc.*, v. *Baltimore & O. R. Co.*, 303 I.C.C. 725, 730. Compare *Albany Port District Comm.* v. *Ahnapee & W. Ry. Co.*, 219 I.C.C. 151, in which the Commission prescribed maximum reasonable export rates to Albany, N. Y., which would **[425]** be justly related to export rates to north Atlantic ports. It should be noted that the situation of Chicago in relation to the gulf ports is not comparable to that of Albany in the cited case.

Complainant also points out that the IC meets truck-barge competitive rates of the non-defendant Chicago and North Western Railway Company (C&NW) from Freeport and some other northern Illinois origins but refuses to meet similar rates of that carrier from central Illinois origins. That the C&NW, in its managerial discretion, has gone further than the IC to meet truck-barge competition is of no significance here under section 1 of the act. *Rath Packing Co.* v. *Ahnapee & W. Ry. Co.*, 296 I.C.C. 693, 713; *Tovrea Packing Co.* v. *Atchison, T. & S. F. Ry. Co.*, 197 I.C.C. 494, 498.

Insofar as complainant's various rate comparisons pose a question of "relative reasonableness," this is not ger-

mane to section 1 and is accordingly reserved for consideration in connection with section 3(1) of the act. *Southeastern Assn. of R. & Util. Commrs.* v. *A., T. & S. F. Ry.*, 321 I.C.C. 519, 545; *Port of New York Authority* v. *Aberdeen & R. R. Co.*, 318 I.C.C. 469, 475-476.

Complainant's cost-of-service evidence, which tends to show that the individual defendants' average fully distributed costs exceed the assailed rates by from 3.8 to 5.7 percent, is criticized by defendants; but, according it full credence, it still would not demonstrate unreasonableness in such rates, and therefore it need not be considered further in this connection. *General Motors Corp.* v. *New York Central R. Co.*, 311 I.C.C. 622, 625.

The fact relied upon by defendants that the assailed rates, other than those depressed by truck-barge competition, reflect a prescribed rate level as subsequently modified by general increases, is persuasive but not conclusive. For the rates were prescribed for the transportation of grain, not soybeans, and primarily for domestic, not export, traffic to Chicago. Moreover, this standard has been eroded by the defendants' institution of truck-barge competitive rates on corn, some of which are lower than the truck-barge competitive soybean rates and have more extensive origin application in Illinois.

The burden of proof, however, is on complainant. The examiner finds, upon consideration of all the evidence under section 1 of the act, that complainant has not shown the assailed rates to be unjust or unreasonable in violation of that section.

* * * * * *

Section 3(1a).—Complainant contends that soybeans exported through the port of Chicago are entitled to specific export rates in accordance with the Congressional policy expressed in section 3(1a) of the act, and that such rates, in any event, should not exceed defendants' export rates on soybean meal to Chicago. Added to the act by the Transportation Act of 1940, section 3(1a) states:

It is hereby declared to be the policy of Congress that shippers of wheat, cotton, and all other farm commodities for export shall be granted export rates on the same principles as are applicable in the case of rates on industrial products for export. The Commission is hereby directed, on its own initiative or an application by in- [426] terested persons, to make such investigations and conduct such hearings, and, after appropriate proceedings, to issue such orders, as may be necessary to carry out such policy.

In support of its position complainant cites *Export Grain from Buffalo to New York*, 278 I.C.C. 31, and *Georgia Peanut Co.* v. *Atlantic Coast Line R. Co.*, 280 I.C.C. 775, both of which, as will be seen, have had some subsequent history. The *Export Grain* case involved a proposal by carriers serving the ports of Portland, Maine, Boston, Mass., and Albany and New York, N. Y., to reduce their export rates on ex-lake grain from Buffalo to those ports by 0.5 cent, thereby equalizing those ports with Philadelphia, Pa., and Baltimore. The Secretary of Agriculture there contended that, because the export rates on other commodities from Buffalo to the same ports had been equalized, the proposed equalization was required by section 3(1a). Rejecting this contention, the Commission stated (278 I.C.C. at 38-39):

> In our view the "same principles" underlying the export rates on industrial products are extended to grain when the export rates on grain are made lower than for local application, and are not departed from when due recognition is given to adjustments of port relations required by the transportation standard for grain and not for the other commodities. To hold otherwise would subordinate uniformity in the application of rate making principles to uniformity in the rates themselves, contrary to the evident intent of Congress and to the rate making principles long approved by this Commission and the courts as in accord with the law.

Upon judicial review the Commission's decision, finding the proposed equalization not shown to be just and unrea-

sonable, was set aside for lack of support of adequate findings and substantial evidence. *New York Central R. Co.* v. *United States*, 99 F. Supp. 394. The court, however, found it unnecessary to pass on the plaintiffs' additional contentions that the proposed equalization was required by section 3(1a). *Ibid.*, at 405. Thereafter, upon further hearing, the Commission by a general finding again rejected the section 3(1a) contention but concluded for other reasons that the proposed port equalization had been justified. *Export Grain from Buffalo to New York*, 292 I.C.C. 647.[4]

From the standpoint of complainant here the most that can be said from the *Export Grain* litigation is that in a case involving port equalization the Commission by way of *dictum* has recognized that "when the export rates on grain are made lower than for local application," this may be pursuant to an underlying transportation principle.

The only judicial discussion of section 3(1a) is to be found in *Georgia Peanut Co., Inc.* v. *Interstate Commerce Commission*, 110 F. Supp. 556, which sustained the decisions and orders of the Commission in *Georgia Peanut Co.* v. *Atlantic Coast Line R. Co.*, 280 I.C.C. 775; 284 I.C.C. 308. That was a reparations case involving export rates which were higher than the corresponding domestic rates on raw shelled peanuts. The Commission found *inter alia* that such rates were not inconsistent with the policy stated in section 3(1a). Upon judicial review the court adverted to **[427]** the plaintiffs' contention that section 3(1a) "requires the establishment for farm commodities of export railroad rates which are lower than prevailing domestic rates on such commodities 'on the same principles as are applicable in the case of rates on industrial products for export'," and said (110 F. Supp. at 557-558):

In passing upon these contentions, Division 3 found, and the Commission affirmed, that: "There is no general principle that export rates shall be less than, or

[4] See also *Neuces County Nav. District No. 1* v. *Abilene & S. Ry. Co.*, 291 I.C.C. 459, 470.

even the same as, the corresponding domestic rates." They found further that "it is clear from the evidence that the principle which has been followed in making export rates on peanuts is no different from that applied to industrial products affected by similar competitive forces." There is substantial evidence in the record to support these findings. This Court, then, must accept them to be facts.

The Commission having found, on the basis of substantial evidence, that there is no rate-making principle requiring export rates to be equal or lower than domestic rates, and that the same rate-making principles were applied in fixing these rates, and they were applied in the same manner as in fixing the export rates on industrial products, there remains for this Court but one question:

Does 3(1a) of the Interstate Commerce Act itself require that rates on farm commodities for export be lower than, or equal to, or bear any fixed relationship to the rates on farm commodities shipped for domestic consumption?

We think not.

It should be noted that section 3(1a) of the Interstate Commerce Act makes no reference to domestic rates, agricultural or industrial. The section does not require that export rates on farm commodities bear any fixed relationship to domestic rates, or to either export or domestic rates on industrial products. The section requires only the equal application of rate-making principles in the fixing of rates for industrial products shipped for export. 49 U.S.C. § 3(1a).

This, the Commission found, has been done. Such a finding cannot be reviewed where there is warrant in the record.

The meaning of Section 3(1a) is clear and unambiguous but, if there were any doubt as to its meaning as urged by the plaintiffs, the legislative history of the section would not only support but require the construc-

tion here adopted. The deletion of the original Jones amendment in conference was a clear refutation of the contention here urged by the plaintiffs.

The net teaching of these cases, as related to the present issue, is that section 3(1a) "requires only the equal application of rate-making principles in the fixing of rates for farm commodities shipped for export and the fixing of rates for industrial products shipped for export," and that one seeking to invoke the policy of that section, per se or in aid of other provisions of the act,[5] must identify the claimed rate-making principle and, by substantial evidence, justify its application to the relief sought.

Complainant's section 3(1a) theory appears to be that, in accordance with a generally recognized rate-making "principle", defendants' export rates should be lower than their domestic rates on soybeans. The evidence relied **[428]** upon in this connection, however, shows that while soybeans and soybean meal (an industrial commodity) have been accorded export rates lower than domestic rates from Illinois origins to Gulf and north Atlantic ports, not only are the assailed rates on soybeans to Chicago the same as apply on domestic traffic, but the same is also true for soybean meal. Thus, insofar as the presumed "principle" is concerned, soybeans exported through the port of Chicago are accorded exactly the same treatment as soybean meal, the only industrial commodity referred to by complainant. It is immaterial in this context that defendants' rates on soybeans exceed their rates on soybean meal or, from some origins, on corn. See *Bunge Corp.* v. *Ann Arbor R. Co.*, 283 I.C.C. 617, 626.

The examiner finds that the assailed rates have not been shown to contravene the policy stated in section 3(1a) of the act.

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[5] Cf. *Class Rates, Mountain-Pacific Territory*, 296 I.C.C. 555; *Class Rate Investigation, 1939*, 262 I.C.C. 447, 512, 688; 264 I.C.C. 41, 62.

[428]

APPENDIX A

To Chicago

Illinois origin	Railroad serving	Miles[1]	1936 Grain rate[2]	First class rate	Present soybean rate	Percent of first class	Rate sought
Mazonia	GM&O	63	9.5	135	11	8.1	13
Gilman	IC	80	11	148	26.5	17.9	13
Gibson City	IC, Wab	109	11.5	165	26.5	16.1	15
Champaign	IC, Wab	127	11.5	176	26.5	15.1	16
Atlanta	GM&O	146	11.5	176	26.5	15.1	17
Decatur	IC, Wab	167	11.5	197	26.5	13.5	18
Pana	C&EI, IC	200	12.5	208	28	13.5	19
Edgewood	IC	215	13	218	29.5	13.5	20
Litchfield	IC, Wab	228	14.5	222	32.5	14.6	20
Salem	C&EI	246	14.5	236	32.5	13.8	21
Grayville	IC	264	15.5	242	34	14.1	22
Marion	C&EI, IC	309	16.5	259	36	13.9	23

[1]By shortest route, as shown in complainant's exhibit 45.

[2]Prescribed in *Grain and Grain Products*, 215 I.C.C. 83, 103-105.

APPENDIX B

To New Orleans

Illinois origin	Miles[1]	First class rate	Soybean rate	Percent of first class
Mazonia	958(g)	454	42	9.3
Gilman	812	440	38.5	8.8
Gibson City	814	426	38.5	9
Champaign	765	419	38.5	9.2
Atlanta	875(g)	426	38.5	9
Decatur	758	411	38.5	9.4
Pana	726	399	38.5	9.6

[429]

To New Orleans—Continued

Illinois origin	Miles[1]	First class rate	Soybean rate	Percent of first class
Edgewood	679	384	38.5	10
Litchfield	750(w)	399	38.5	9.6
Salem	665(c)	378	28.5	7.5
Grayville	723	370	39	10.5
Marion	640	378	25.5	6.7

[1]Via IC, except as noted, as shown in complainant's exhibit 17.
c—Via C&EI-Marion, IC.
g—Via GM&O.
w—Via Wabash-E. St. Louis, IC.

APPENDIX C

Receipts of soybeans at Chicago by modes of transportation

(1,000 bushels)

	1960	1961	1962	1963
Truck	12,022	6,491	10,768	13,187
Great Lakes	912	1,601	1,134	902
Illinois Waterway	9,217	7,917	7,946	11,287
C&EI	142	88	881	440
GM&O	20	186	186	291
IC	382	436	1,064	1,652
Wabash	96	220	502	118
Total defendants	640	858	2,633	2,501
Other rail	9,274	11,774	11,373	12,088
Total	32,065	28,641	34,454	39,965

APPENDIX D

Shipments of soybeans from Chicago by modes of transportation

(1,000 bushels)

	1960	1961	1962	1963
To Canada	8,702	4,697	7,547	12,244
Overseas	2,010	3,505	4,446	4,104
Total Lake and Seaway	10,712	8,202	11,993	16,348
Illinois Waterway	454	428	1,730	73
C&EI	426	688		
GM&O	2	164	10	14
IC	114	661	199	466
Wabash	1,282	2,430	1,833	4,087
Total defendants	1,824	3,943	2,092	4,569
Other rail	2,278	4,054	1,640	2,603
Total rail	4,102	7,997	3,732	7,172
Total	15,268	16,627	17,455	23,593

APPENDIX D

[329 I.C.C. 529]

[529] INTERSTATE COMMERCE COMMISSION

No. 34348

BOARD OF TRADE OF THE CITY OF CHICAGO v. ILLINOIS CENTRAL RAILROAD COMPANY, ET AL.

Decided March 13, 1967

On reconsideration, carload rates on soybeans from Illinois origins to Chicago, Ill., for export found not shown to be unjust, unreasonable, or in contravention of the policy stated in section 3(1a) of the Interstate Commerce Act, but found unduly prejudicial to the port of Chicago and unduly preferential of Gulf ports to the extent that they exceed the rates to the latter ports. Findings in prior report, 325 I.C.C. 412, affirmed and undue preference and prejudice ordered removed.

Appearances are as shown in the prior report and, in addition:

Richard M. Freeman and *Nuel D. Belnap*, for complainant.

Thomas O. Broker for defendants.

REPORT AND ORDER OF THE COMMISSION ON RECONSIDERATION WALRATH, *Commissioner:*

In the prior report, 325 I.C.C. 412, decided May 10, 1965, division 2 found carload rates on soybeans from Illinois origins for export unduly prejudicial to the port of Chicago, Ill., and unduly preferential of Gulf ports to the extent that they were higher to Chicago. The defendants were ordered to remove the undue preference and prejudice which was found to exist. Upon consideration of the record and the

complaint filed in the United States District Court for the Northern District of Illinois entitled *City of Chicago and Board of Trade of the City of Chicago* v. *United States of America and Interstate Commerce Commission*, Civil Action No. 66C524, we reopened this proceeding by order dated June 10, 1966, for reconsideration on the record as made.

[530] This proceeding arose upon complaint filed by the Board of Trade of the City of Chicago alleging that the local and joint rates[1] maintained by the defendants[2] on soybeans, in carloads, from Illinois origins to Chicago, Ill., when for export, are unjust and unreasonable in violation of section 1 of the Interstate Commerce Act, unduly prejudicial to the port of Chicago and unduly preferential of Gulf ports in violation of section 3(1) of the act, and in violation of the policy of Congress stated in section 3(1a) of the act. The complainant requests that specific export rates to Chicago be prescribed at a maximum level equal to nine percent of the corresponding docket 28300 first-class rates.[3]

Rice Grain Corporation, which operates a terminal grain elevator in the Chicago switching district and is engaged in the merchandising and export of soybeans, intervened

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[1] Rates are stated in cents per 100 pounds.

[2] Illinois Central Railroad Company (IC), Gulf, Mobile and Ohio Railroad Company (GM&O), Wabash Railroad Company (Wabash), and Chicago & Eastern Illinois Railroad Company (C&EI).

[3] Unless otherwise indicated, the docket No. 28300 scale and the first-class rates referred to herein are those prescribed in *Class Rate Investigation, 1939*, 262 I.C.C. 447, and later reports, as modified by subsequent general increases.

in support of the complainant, as did the Chicago Association of Commerce and Industry, and the Department of the Port of Chicago. Interveners supporting the defendants are the New Orleans Traffic and Transportation Bureau and seven companies[4] operating soybeans processing plants in central Illinois.

The facts are adequately set forth in the prior report. They will be restated herein only where needed for a clear understanding of the issues.

The assailed rates on soybeans to Chicago are generally lower from northern and central Illinois origins than the rates from the same origins to the Gulf ports for export. The assailed rates to Chicago from various origins in the southern portion of Illinois are higher than those on movements to the Gulf ports. Rates on soybeans generally to both Chicago and the Gulf ports reflect the influence of intermodal competitive factors. In general, the assailed rates to Chicago are above fully distributed costs while the rates to the Gulf ports are generally somewhat below these costs,

[531] Soybeans are grown throughout most of Illinois, the majority being grown in the five crop-reporting districts of central Illinois. Most of the State's soybeans are grown within 60 miles of navigable water, and more move to Chicago than to the Gulf ports, in many cases by water. Rice Grain Corporation, intervener, purchases soybeans in central Illinois for movement to Chicago by barge, but because of the level of the assailed rates it is not economical to purchase soybeans in that area for rail shipment to Chi-

[4]Allied Mills, Inc., Archer Daniels Midland Co., Central Soya Co., Inc., Lauhoff Grain Co., Ralston Purina Co., A. E. Staley Manufacturing Co., and Swift & Co.

cago. On the other hand, it does purchase corn in central Illinois which is moved to Chicago at competitive rail rates.

There is no question of the ability of the port of Chicago to handle increased exports or of the adequacy of the soybean supply at Chicago. In 1963, a total of 7 million bushels shipped by rail from Chicago to domestic processors could have been available for export had there been sufficient demand to raise the bid price by one quarter of a cent per bushel.

The intervening soybean processors, with plants in central Illinois, show that total plant capacity exceeds soybean production in that area. They are concerned that any reduction in the export rates of Chicago will aggravate this situation. They also fear that they would be placed at a competitive disadvantage in foreign markets if the assailed export rates on soybeans should be lowered in relation to the composite costs of moving soybeans to their plants and the resulting products, soybean meal and soybean oil, to Chicago.

The essential issues are whether the rate comparisons submitted by complainant establish unreasonableness in the assailed rates; whether there exists any violation of the Congressional policy in section 3(1a) of the act by reason of a difference in treatment as regards soybeans for export and those moving domestically; and whether the assailed rates to Chicago are prejudicial to that port and preferential of the Gulf ports to the extent that they are unequal on a mileage scale basis.

Division 2, at page 416 of its report, adopted the hearing examiner's findings which were adverse to the complainant on issues under sections 1 and 3(1a) of the act. It further held that Chicago was entitled to a parity of rates

only, contrary to the recommendation of the hearing examiner who found that the complainant is entitled to equality on a mileage-scale basis as sought. Portions of the hearing examiner's report dealing with the complainant's [532] various contentions are contained in the appendix of the division's report.

SECTION 1(5) AND 3(1a) ISSUES

The examiner concluded, among other things, that insofar as complainant's various rate comparisons pose a question of "relative reasonableness," they were not germane to section 1(5) of the act, citing our unanimous decision in *Southeastern Assn. of R. & Util. Commrs.* v. *A. T. & S. Ry.*, 321 I.C.C. 519, 545. The division 2 decision in *Port of New York Authority* v. *Aberdeen & R. R. Co.*, 318 I.C.C. 469, also cited by the hearing examiner, was reversed on this issue by the Commission in 321 I.C.C. 738, which later decision was sustained on its section 3(1) finding in *Pennsylvania Railroad Co. et al.* v. *United States and Interstate Commerce Commission*, U.S.D.C. Eastern District of Pa., Civil Action 35250, affirmed per curiam, 382 U.S. 368 (1966). We deem it advisable to set forth a definitive statement as to the meaning of the term "relative reasonableness" in order to remove any uncertainty which may exist.

At the outset, we observe that the doctrine finds no statutory sanction beyond the broad terms of section 1 of the act which requires that rates shall be just and reasonable. No precise definition of a reasonable rate is possible; a question of fact is presented. In *Albany Port District Comm.* v. *Ahnapee & W. Ry. Co.*, 219 I.C.C. 151, we said at page 164:

> It is not to be answered by the use of mathematical formulas, but by "the application of good judgment

and fairness, common sense and sense of justice, to the facts of record" (citing *Reparation as Relating to Increase of Rates,* 68 I.C.C. 5). And often, in determining the reasonableness of rates on a particular kind of traffic, the most important facts of record are those pertaining to rates on like traffic in the same general territory. * * *

In numerous proceedings, we have stated the principle that an important test of reasonableness is the comparison of an assailed rate with others which represent a proper standard of comparison. Whenever the reasonableness of a rate is so measured, an examination of the relationship between rates is entailed. The relationship of rates, therefore, may be an important aspect of reasonableness under section 1(5) of the act. It is within this context that the **[533]** term "relative reasonableness" arose and gained usuage in our reports. Thus, in 1924, in *Lackawanna Steel Co.* v. *Director General,* 87 IC.C. 383, division 4 said at page 384:

> At the outset it should be noticed that throughout the record it is made very clear that the unreasonableness of which the complainants complain is "relative unreasonableness" as distinguished from "intrinsic" or "per se unreasonableness," the idea apparently being that a state of facts may be shown which would justify a finding of relative unreasonableness but would not justify a finding of unreasonableness per se. We have made use of the term "relative unreasonableness" in other cases. It is well known that substantially all of our findings of unreasonableness are, and must of necessity be, based to a great extent upon a measuring and weighing of the rates attacked with other rates which appear to afford a proper basis of comparison, so that, generally speaking, when we find a rate unreasonable, it is in effect, on account of the method by which our conclusion must be reached, *a*

finding that the rate is unreasonable by comparison or relatively. In arriving at such a conclusion we must, of course, be convinced that the rates cited by way of comparison are properly comparable and that, when given the weight to which they are entitled they sufficiently indicate that the level of the rates attacked is too high. This question calls for the exercise of our judgment upon the particular facts presented. The mere fact that a rate under attack appears to be out of line with a few other rates to which it is closely related does not ordinarily afford a basis for finding the rate attacked unreasonable. Such a showing may as well indicate that the comparative rates are too low as that the rate assailed is too high, and the correction of such a maladjustment properly might be made under section 3 of the act but not under section 1. (Emphasis supplied)

Stated another way, a rate may be unreasonable in relation to another, or relatively, as a result of comparing the two. A rate likewise may be unreasonable in relation to cost, in relation to a prescribed basis of rates, or in relation to any other satisfactory standard which permits us to measure and determine the factual question presented. Broadly, then, it may be said that every unreasonable rate is "relatively unreasonable."

Questions as to the relation of rates, *independent of their measure or level,* are decided under section 2 or 3 of the Interstate Commerce Act, dealing with unjust discrimination and undue prejudice. *Foye* v. *Atchison, T. & S. F. Ry. Co.,* 255 I.C.C. 466, 467. Our decision in *Southeastern Assn. of R. & Util. Commrs.* v. *A. T. & S. F. Ry., supra,* therefore, should not stand for the proposition that rate relations are without significance under section 1. As previously indicated, and as recognized in the *Foye* case, *supra,* they may play an important role in appraising the reasonableness of a rate under section 1.

The well-settled rule that rate comparisons have been considered acceptable evidence of the reasonableness of [534] rates was recently affirmed in *Emery Common Carrier Rates—Various Commodities,* 326 I.C.C. 415, 420, citing among other authorities the *Port of New York* case, *supra.* In this latter proceeding it was recognized, in accordance with precedent, that a doctrine of "relative unreasonableness," unless carefully defined and applied, would tend to confuse unnecessarily the purposes of section 1(5) and 3(1) of the act. In so stating, the reference, of course, was to the result of rate comparisons which, as has been indicated, present a "relationship" cognizable under section 1 but distinguishable from the broader section 3 determination.

As previously indicated, the determination of reasonableness is a judgment matter based on the consideration of all circumstances in a given situation, no one necessarily being of controlling importance. Thus, in an appropriate case where the compared rates satisfy the test of a proper basis of comparison, we may find a rate which is below full costs to be unreasonably high.

In this proceeding, however, we are not persuaded that the rate comparisons are valid. For example, the comparison of the assailed rates with those on soybeans to the Gulf serves little purpose since, generally, the rates to Chicago are already lower. Likewise, the complainant's comparison of the assailed rates with rates on soybean meal are of little value since it has not been shown that this commodity has transportation characteristics similar to those of soybeans. In this regard, the rates on soybean meal also fail to constitute a sound standard of comparison by reason of the competitive factors which influence their current level. *Cf. Vegetable Cake and Meal, I.F.A.,*

S.F.A., S.W.L., and W.T.L. Ter., 310 I.C.C. 157. As to the comparison with the rates on corn, the complainant has not shown that those rates are necessarily a valid measure of reasonableness or that transportation conditions are comparable. For example, the terminal costs for the movement of soybeans are greater at Chicago than for corn. And, competitive conditions are materially different. That the assailed rates exceed the complainant's showing of fully distributed costs, while those to Gulf ports do not, does not establish that the assailed rates exceed maximum reasonableness. See *General Motors Corp.* v. *New York Central R. Co.*, 311 I.C.C. 622, 625, affirmed in *General Motors Corporation* v. *United States*, 209 F. Supp. 641, cited by the hearing examiner. The same can be said of comparisons of car-mile earnings.

[535] For the above stated reasons, we adopt the division's finding under section 1 of the act. We also adopt its finding under section 3(1a) for the reasons enumerated in the prior report.

SECTION 3(1) ISSUES

In finding that undue preference and prejudice exists where the rates are higher to Chicago, division 2 recognized (1) the general similarity of transportation conditions and circumstances as between ports, (2) the existence of competitive conditions of varying degrees in connection with the involved rates, (3) the dominant position of Chicago so far as volume of soybean shipments is concerned, and (4) the generally effective competitive posture for Chicago in relation to the Gulf Ports. We agree with these conclusions. In addition, the record shows that the level of the rates sought by the complainant could have adverse effects upon processors in central Illinois. It appears that the possibility exists of creating a preferential situation in treating the one of which complaint is made.

As noted in the prior report, the transportation costs of transporting soybeans from Springfield to Chicago, and the composite cost for transportating them from Springfield to Decatur and soybean products from Decatur to Chicago, are equal. Under the sought rates, the export of soybeans would obviously be favored and this would be true whether the soybean and composite rates are the same as in this example, or whether they vary as is more generally the case. The adverse effect would be the same in proportion.

It is clear also that the Gulf ports would be disadvantaged under the sought basis of rates. As has been noted, the rates to Chicago are already substantially lower than those to the Gulf in most instances. Chicago, therefore, is not only not disadvantaged, except as to rates from southern Illinois origins, but under the sought basis would receive an additional advantage over the Gulf ports which would tend to impede the free flow of traffic as between the ports here involved. While, as was held in *Cudahy Packing Co.* v. *Akron, C. & Y. R. Co.*, 318 I.C.C. 229, affirmed Sub. Nom. *Atchison, T. & S. F. Ry. Co.* v. *United States*, 218 F. Supp. 359, that it is not necessary for the complainant to show actual injury to prove a violation of section 3(1), the record herein establishes not only a general rate advantage but also a generally adequate supply of soybeans for storage and for export at Chicago.

[536] The amendment of section 3 of the act to include "ports" was intended to "afford competing ports a forum in which to complaint of rate adjustments which tend to concentrate the movement of traffic through one or a limited number of ports and to deprive other ports of an opportunity to handle a part of such traffic" and to "encourage and promote the freedom of movement of export * * * commerce through the ports of the country." *Brazos River Harbor Nav. Dist.* v. *Abilene & S. Ry. Co.*, 322 I.C.C.

529, 534, sustained Sub. Nom. *Atchison, T. & S. F. Ry. Co.* v. *United States,* 231 F. Supp. 422, 431. As has been indicated, Chicago dominates the soybean traffic due to its geographical advantage of proximity to the producing area and presently lower rates. The sought basis of rates would reduce even more the flow of soybean traffic to the Gulf ports for export. The transportation conditions and circumstances shown on this record are not so dissimilar as to warrant lower rates to Chicago in every instance. Although the maintenance of the same rates on movements to Chicago as to the more distant Gulf ports would in some instances deprive Chicago of some of the benefits of its geographic advantage, we do not consider the resulting disadvantages to Chicago to be undue in light of all the circumstances presented herein. The complainant is not entitled as a matter of law and of sound policy to a scale of rates tailored exclusively to the distance from the producing areas. In *Cudahy Packing Co.* v. *Akron, C. & Y. R. Co., supra,* relied on by complainant as compelling use of the docket 28300 scale for comparative purposes, the equality of rates on fresh meats and packinghouse products were related to the docket 28300 scale. Those rates, however, applied in the same direction and were domestic in nature. They were not under consideration as applicable on traffic moving to ports and localities in diverse areas of the country for export. The evidence in this proceeding does not warrant a conclusion that the docket 28300 scale, or any other scale, would be the acceptable standard for our purposes herein. Furthermore, such use of a rate scale herein would make mileage the controlling factor contrary to the purpose of section 3(1). It would create the very situation under that section which we are usually called upon to prevent, namely, rate levels which deny a more distant port or locality the right to freely compete for available traffic.

For the above-stated reasons, we agree with division 2 that the port of Chicago is only entitled to rates which are no higher than those to the Gulf ports. There is some indication that fourth-section departures may result from ad- [537] justment of the rate structure in accordance with our findings herein. The defendants may apply for appropriate relief from section 4 of the act in the event this occurs.

We find that the assailed rates on soybeans, in carloads, from Illinois origins to Chicago for export have not been shown to be unjust or unreasonable, or to contravene the policy stated in section 3(1a) of the act.

We further find that the assailed rates on soybeans from Illinois origins to the port of Chicago for export that are higher than the corresponding export rates on soybeans from the same origins to the Gulf ports are unduly preferential of the Gulf ports and unduly prejudicial to Chicago. In all other respects the assailed rates have not been shown to be unduly preferential or prejudicial. The findings in the prior report are affirmed.

COMMISSIONER MURPHY, dissenting in part:

I am in agreement with the finding of a section 3(1) violation, but I am unable to subscribe to the relief granted. Parity of rates under the circumstances herein does not cure the undue prejudice found to exist to the Port of Chicago and the undue preference of the Gulf ports. While I am prepared to overlook mileage differences of perhaps 100 or even 200 miles so as to promote the free flow of traffic between competing ports, I cannot disregard differences as great as that shown herein. In *City of Wilmington* v. *Alabama G.S.R. Co.*, 316 I.C.C. 729, 319 I.C.C. 620, a 25-percent difference in distances between competing

points was referred to as a reasonable maximum. In the subject proceeding the majority finds that a 270-percent difference resulting from a comparison between mileages from Salem, Ill., to Chicago, 246 miles, and from that same point to New Orleans, 665 miles, is of little consequence. The same inequities can be observed when comparisons are made with other points in southern Illinois as shown in appendices A and B of the prior division 2 report. In my opinion the holding herein goes too far and pursued to the ultimate by parties in future proceedings we would be bound to provide port equalization for almost all ports from locations throughout the country.

COMMISSIONER BROWN, dissenting:

Reduced to its essentials, the Chicago Board of Trade here seeks, on a mileage basis, a parity of export rates with Gulf ports on soybeans from origin points in Illinois. [538] In the prior report division 2, almost 2 years ago, granted relief on an absolute cents-per-100-pounds basis. That is to say, relief, was granted only in instances where the Chicago rates were higher than those to Gulf ports in terms of cents per 100 pounds.

The Chicago Board of Trade is anxious to increase Chicago's 10 percent share of export soybeans because almost 25 percent of U. S. crop is produced in Illinois. Existing rate structures create artificial barriers which, in fact, prohibit any appreciable change in present traffic patterns. The area of greatest production is central Illinois. From this area, complainant has been denied relief of any kind by the Commission.

Rather than remove uncertainty about the doctrine of "relative reasonableness," the majority, in my judgment, makes it a rule of confusion. The main thrust of complainant's case is that under a test of "relative reasonableness"

a parity of reasonable rates should embrace concepts of a mileage basis justification and not merely absolute concepts of rates in cents-per-hundred-pounds. The majority, in my judgment, uses "absolute" and "relative" so interchangeably that their meaning is not clear.

COMMISSIONER WEBB, did not participate.

It is ordered, That the defendants named in the complaint, to the extent that they participate in the transportation, be, and they are hereby notified and required to cease and desist from practicing the undue preference and prejudice found to exist on or before June 5, 1967.

It is further ordered, That said defendants be, and they are hereby notified and required to establish on or before June 5, 1967, upon not less than 30 days' notice to this Commission and to the general public by filing and posting in the manner prescribed by this Commission under section 6 of the Interstate Commerce Act, and thereafter to maintain and apply rates which will prevent and avoid the undue preference and prejudice found herein to exist.

And it is further ordered, That this order shall remain in effect until further ordered of the Commision.

By the Commission.

H. NEIL GARSON,
Secretary.

(SEAL)

APPENDIX E

CHARTS SHOWING THE RATE SITUATION AT THE TIME OF THE FILING OF THE BOARD OF TRADE'S COMPLAINT WITH THE COMMISSION AND THE SITUATION WHICH RESULTED FROM THE COMMISSION'S DECISION.

The facts in this case, which are relatively simple, are illustrated by seven charts which follow. The first six charts are based on evidence of record, as indicated. The seventh chart is based upon the Commission's decision, giving its proposed solution to the controversy.

Illinois is the largest soybean-producing state in the United States, producing nearly one-fourth of the nation's total. Seventy percent of the production of soybeans in Illinois is in that part of the state roughly described herein as central Illinois. (Illus. No. 1). The Illinois Central Railroad serves more origins in Illinois than any other railroad and the four railroads here involved serve 599 origins in central Illinois, from which the average mileage to Chicago is 172 miles and the average mileage to New Orleans is 829 miles. (Illus. No. 2).

Illustrations 3 and 4 show the rates in effect, at the time of the Commission hearing, on soybeans and soybean meal from five representative origins to Chicago and New Orleans and the levels of those rates are compared in illustration No. 5. The level of the rates on soybeans to Chicago, as tested by the prevailing first-class rates, is substantially higher than the level of the export soybean rates to New Orleans, or the export soybean meal rates to Chicago or New Orleans.

Illustration No. 6 shows that the rates on soybeans to Chicago, for export, exceed rail fully-distributed costs, but those to New Orleans are below such costs.

Illustration No. 7 shows the rates on soybeans to Chicago, for export, which resulted from the Commission's decision. From Cairo, Ill., 365 miles to Chicago, the rate which was found to be just and reasonable and non-prejudicial to Chicago is 20.5 cents, the same as to New Orleans. As one progresses north from Cairo and the distance to Chicago *decreases*, the rate to Chicago *increases* up to Centralia (252 miles to Chicago, 666 miles to New Orleans), where the rate is 28.5 cents, again the same as the rate to New Orleans. Then a 26.5-cent rate group is encountered, from which the corresponding rate to New Orleans is 38.5 cents. At the northern end of this group is Gilman, 81 miles from Chicago, from which the rate to Chicago is 26.5 cents, 6.5 cents higher than the rate from Cairo, 365 miles from Chicago.[1]

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[1]All rates mentioned have been slightly increased as a result of nationwide general increases in railroad rates. The resulting departures from the long-and-short-haul provision of section 4(1) of the Act, 49 U.S.C. §4(1), were permitted by F.S.O. No. 20067, entered April 5, 1966. One of the defendants, the Chicago and Eastern Illinois Railroad did not apply for fourth-section relief but held the rate established from Cairo to Chicago as a maximum from intermediate origins. The Commission's original report of May 10, 1965, makes no mention of fourth-section departures. F.S.O. No. 20067 was entered on application of the IC and GM&O railroads over the protest of the Board of Trade that such relief would be improper. See *Mechling Barge Lines* v. *United States*, 376 U.S. 375 (1964). In its report on reconsideration, *issued eleven months after the entry of F.S.O. No. 20067, and the date when the rates became effective (April 6, 1966)*, the Commission said there was "some indication that fourth-section departures may result from adjustment of the rate structure in accordance with our findings herein," and that "defendants may apply for appropriate relief from section 4 of the Act in the event this occurs."

ILLUSTRATION NO. 1

Illinois is the top soybean production state, producing nearly one-fourth of the nation's total.

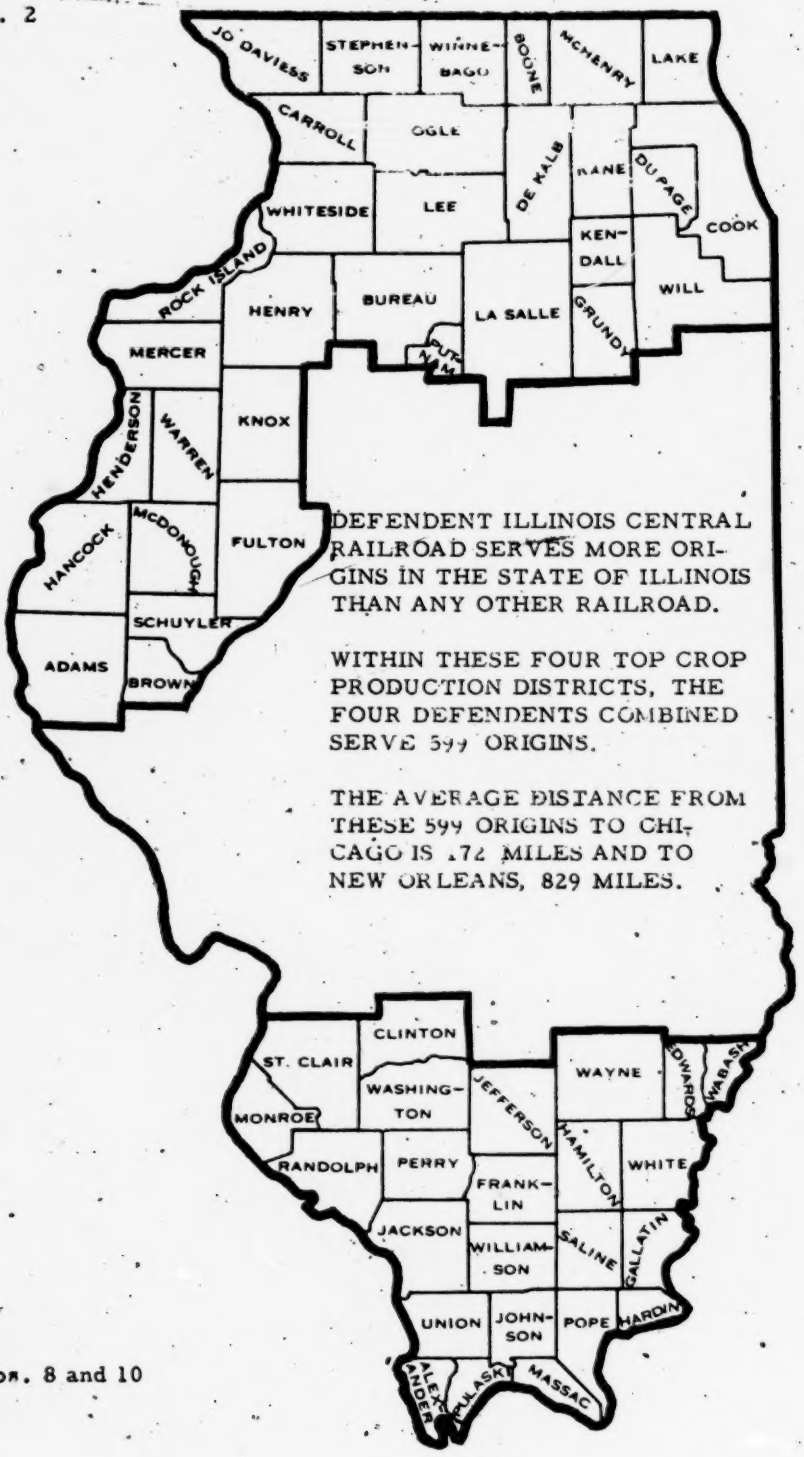
For statistical purposes Illinois is divided into nine crop districts.

The Central, East, West Southwest and East Southeast Districts produce 70 percent of all of the soybeans grown in Illinois.

Champaign County, alone, produces more soybeans than the entire Northwest District.

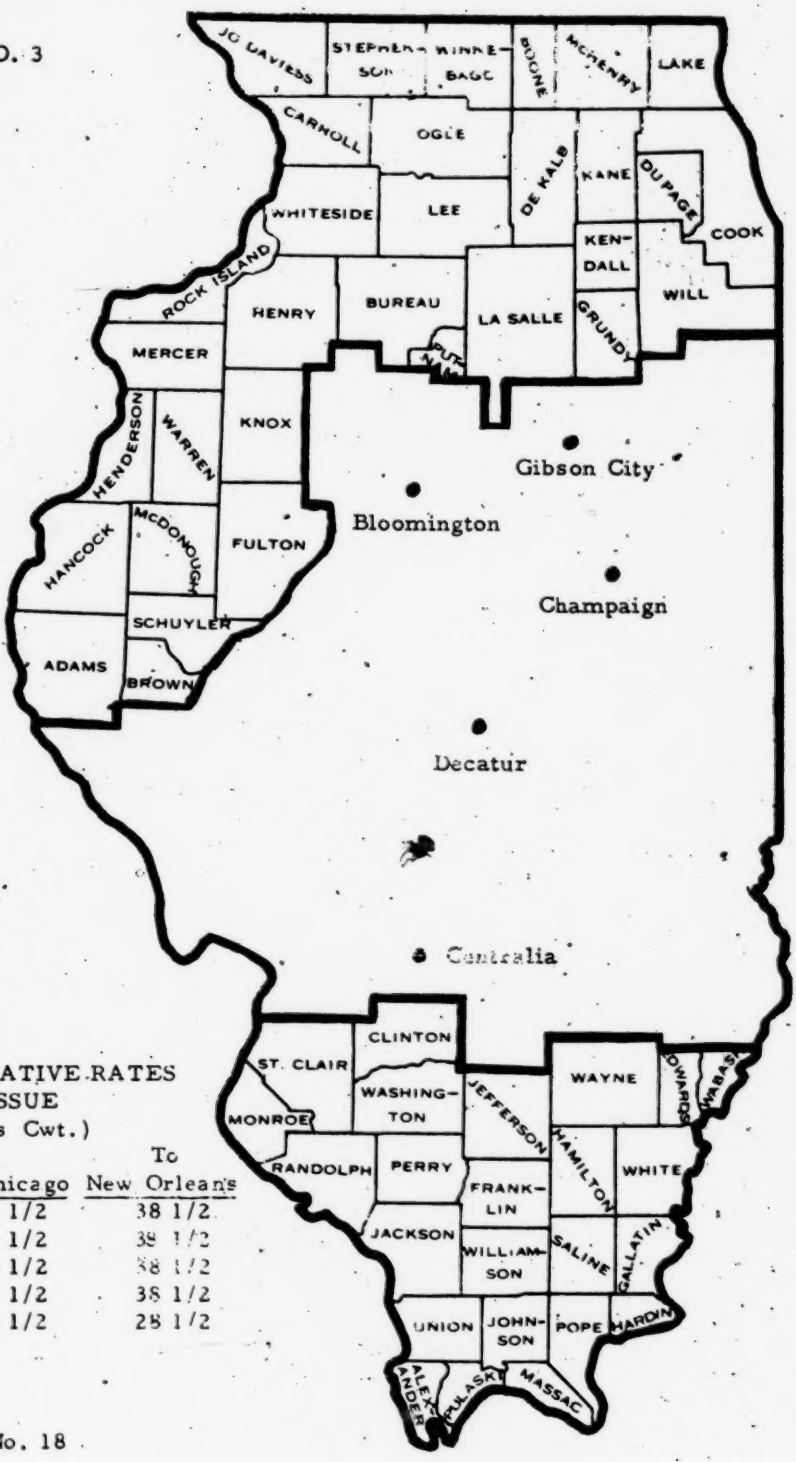
Source: Exhibit No. 5

ILLUSTRATION NO. 2



Source: Exhibit Nos. 8 and 10

ILLUSTRATION NO. 3

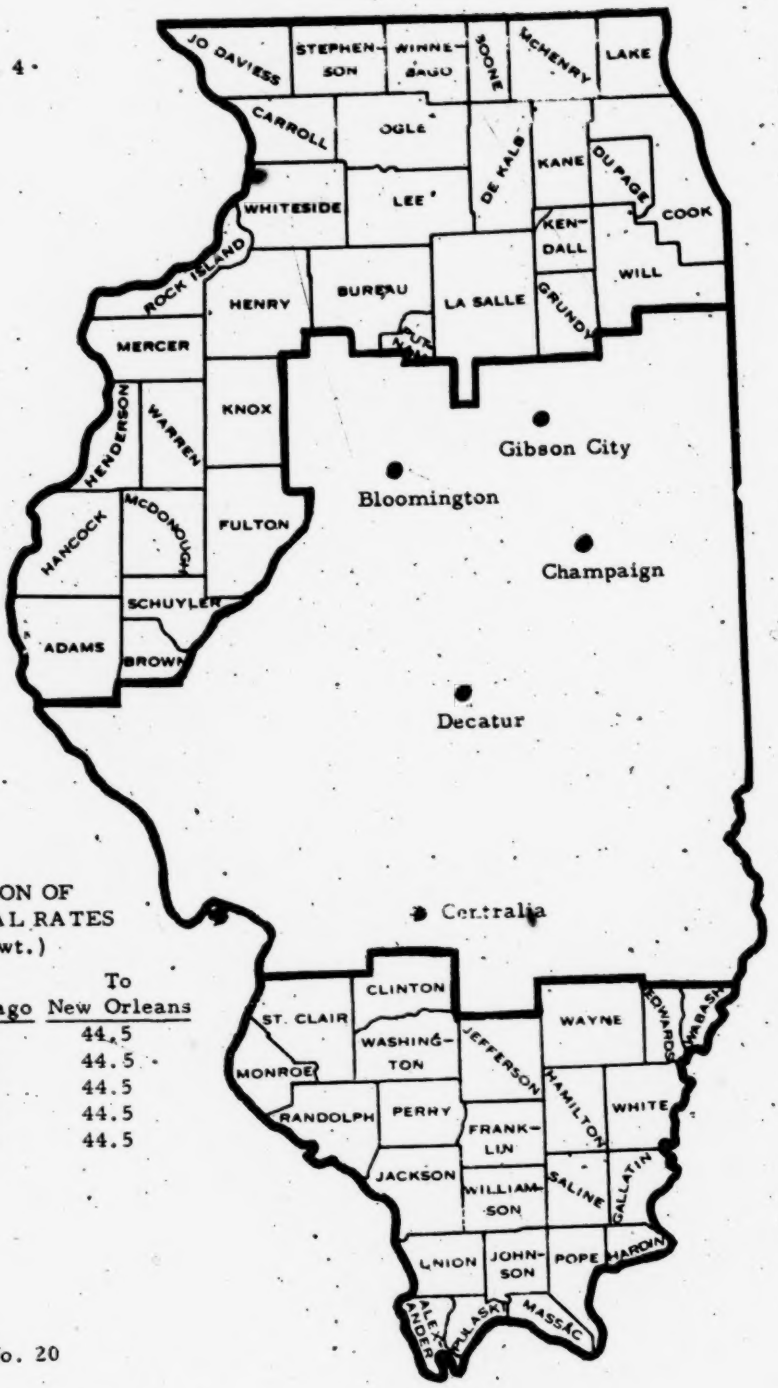


REPRESENTATIVE RATES IN ISSUE
(Cents Cwt.)

From	To Chicago	To New Orleans
Gibson City	26 1/2	38 1/2
Bloomington	26 1/2	38 1/2
Champaign	26 1/2	38 1/2
Decatur	26 1/2	38 1/2
Centralia	32 1/2	28 1/2

Source: Exhibit No. 18

ILLUSTRATION NO. 4

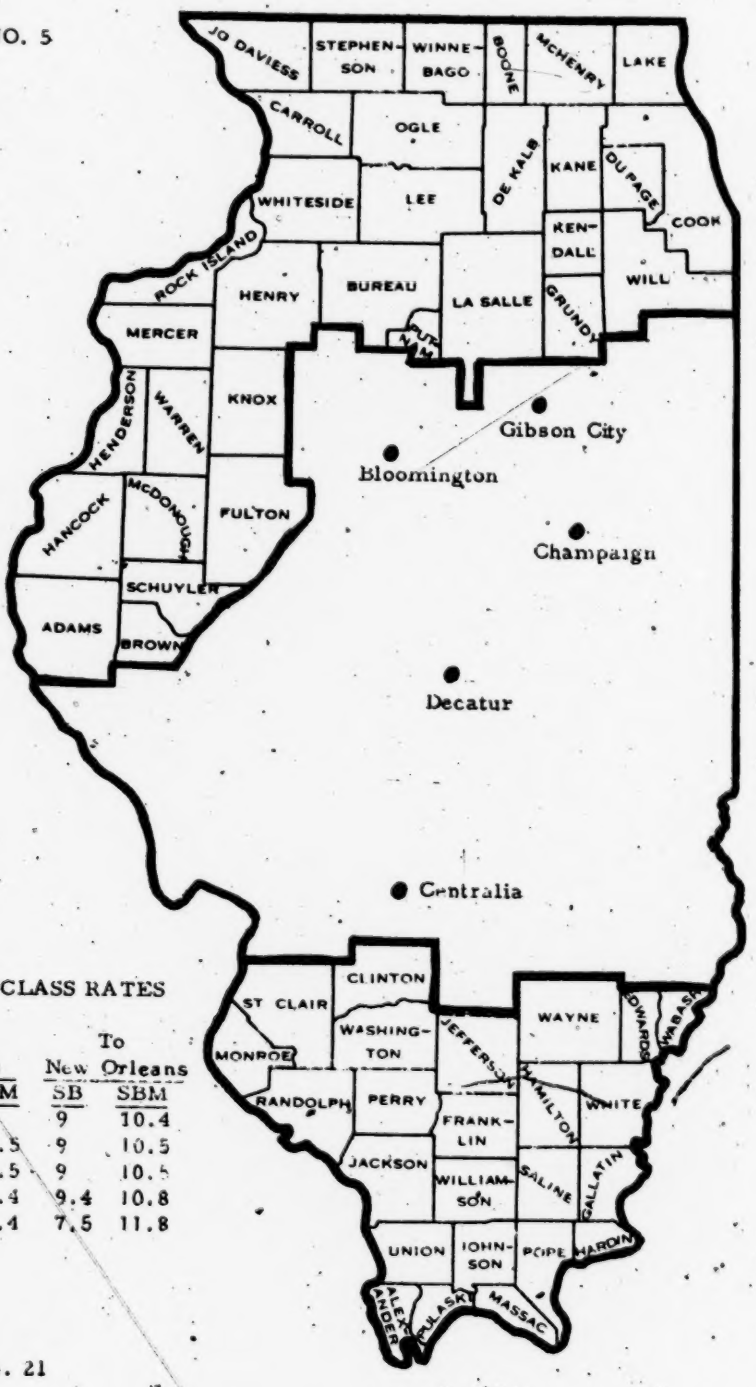


COMPARISON OF
SOYBEAN MEAL RATES
(Cents Cwt.)

From	To Chicago	To New Orleans
Gibson City	16.5	44.5
Bloomington	18.5	44.5
Champaign	18.5	44.5
Decatur	22.5	44.5
Centralia	31.5	44.5

Source: Exhibit No. 20

ILLUSTRATION NO. 5



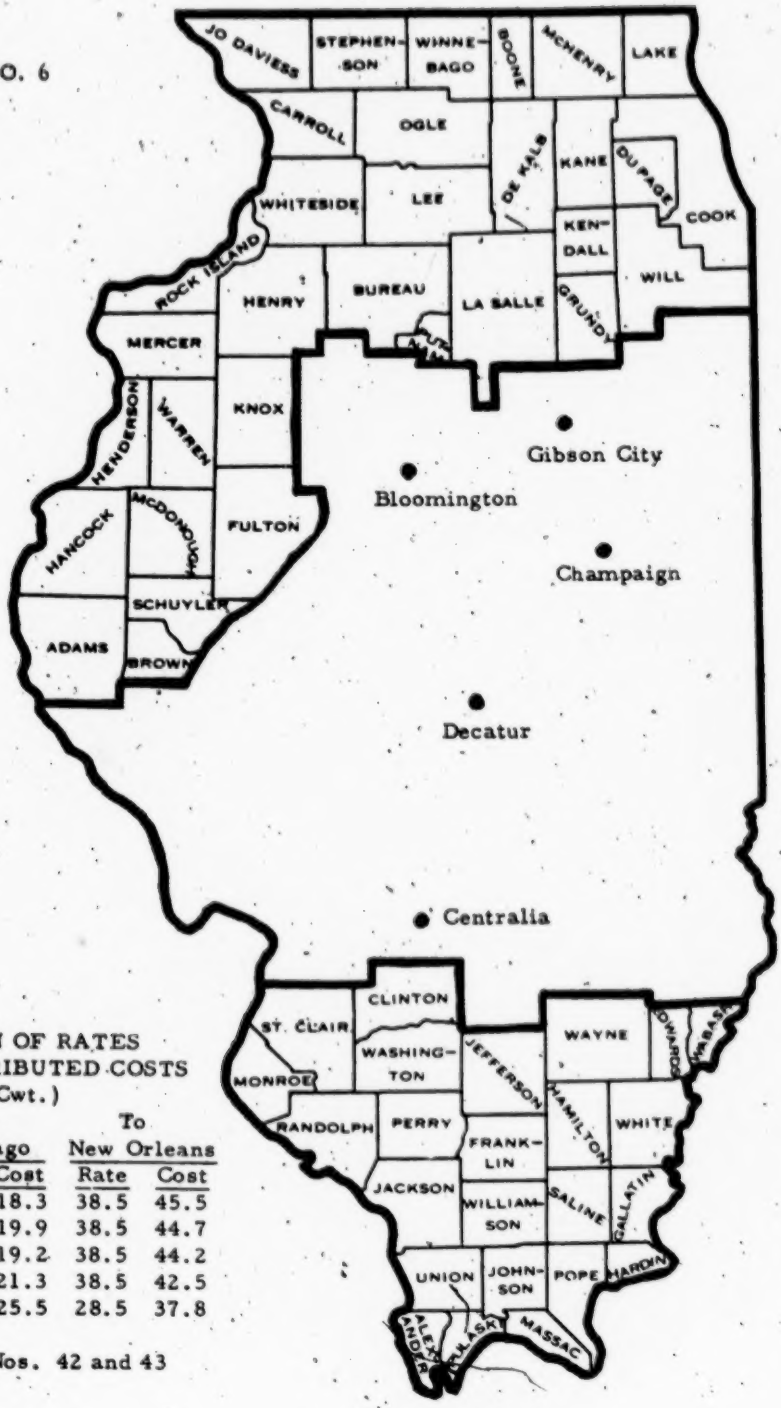
PERCENT OF FIRST CLASS RATES

	To Chicago		To New Orleans	
	SB	SBM	SB	SBM
Gibson City	16.1	10	9	10.4
Bloomington	15.1	10.5	9	10.5
Champaign	15.1	10.5	9	10.5
Decatur	13.5	11.4	9.4	10.8
Centralia	13.8	13.4	7.5	11.8

SB Soybeans
SBM Soybean Meal

Source: Exhibit No. 21

ILLUSTRATION NO. 6

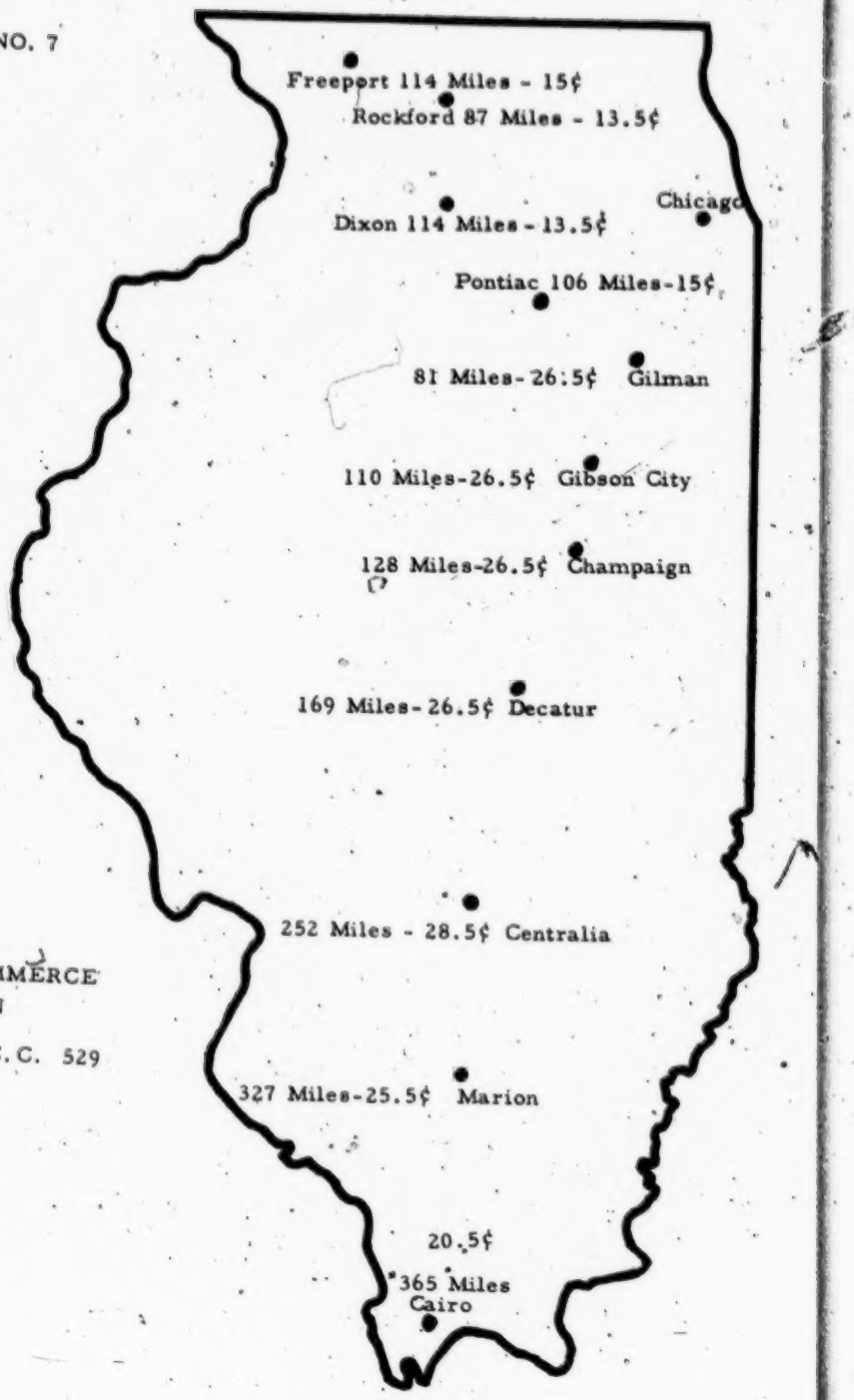


COMPARISON OF RATES
TO FULLY DISTRIBUTED COSTS
(Cents Cwt.)

From	To Chicago		To New Orleans	
	Rate	Cost	Rate	Cost
Gibson City	26.5	18.3	38.5	45.5
Bloomington	26.5	19.9	38.5	44.7
Champaign	26.5	19.2	38.5	44.2
Decatur	26.5	21.3	38.5	42.5
Centralia	32.5	25.5	28.5	37.8

Source: Exhibits Nos. 42 and 43

ILLUSTRATION NO. 7



INTERSTATE COMMERCE COMMISSION

"SOLUTION" 329 I. C. C. 529

APPENDIX F

LEGISLATIVE HISTORY OF THE 1935 AMENDMENT ADDING "PORT" AND "PORT DISTRICT" TO SECTION 3(1) OF THE ACT.

Prior to 1935, section 3(1) did not contain the words "port" or "port district," but the Commission had always proceeded upon the assumption that a port was a "locality" within the meaning of that term as used in section 3(1). In *Galveston Commercial Asso.* v. *Galveston, H. & S. A. Ry. Co.*, 100 I.C.C. 110 (1925), 128 I.C.C. 349 (1927), 160 I.C.C. 345 (1929), the port of Galveston attacked before the Commission the practice of the carriers of maintaining equal export, import, and coastwise rates on various commodities between interior points in Texas, on the one hand, and the ports of Galveston and New Orleans, on the other hand. The Commission held that this resulted in undue preference of New Orleans and undue prejudice to Galveston where the short-line distance to New Orleans exceeded that to Galveston by more than 25 percent. The railroads were permitted to equalize rates where the difference in distance was not more than 25 percent, but where such difference was more than 25 percent, equalization was no longer to be permitted. The Commission's order in that case was set aside by the Supreme Court in *Texas & P. R. Co.* v. *United States*, 289 U.S. 627, on the ground that a port was not a "locality" within the meaning of section 3(1) and that ports as such were not entitled to protection under that section.

Thereafter, bills were introduced in the second session of the 73rd Congress (1934) and the first session of the 74th Congress (1935) to restore to the Commission its power to remove undue preference and prejudice against ports. One of these bills, S. 1633, 74th Congress, First

Session, culminated in the Act which amended section 3(1), effective August 12, 1935, by adding "port" and "port district" to that section.

At the hearings on those bills, representatives of many ports urged that section 3(1) be amended to include ports so as to give the Commission jurisdiction to entertain and determine complaints of undue preference and prejudice between ports. However, representatives of the New Orleans interests testified in opposition to any such amendment unless it included a provision to the effect, for example, that "Nothing herein contained shall be held to prevent carriers from equalizing, in whole or in part, to meet carrier competition, the rates on export, import, or coastwise traffic between interior points and the ports, where such rates do not impose an unjust burden on other traffic." Senate 1934 hearings on S. 2477, pp. 175-178, 198; Senate 1935 hearings on S. 874, pp. 80, 84; House 1935 hearings on H.R. 3006, etc., p. 40. Significantly, Joseph B. Eastman, the Federal Coordinator of Transportation, in a colloquy with Senator Huey Long of Louisiana, put the issue in these simple terms:

> I have always thought that a port or any other locality is entitled to the benefit of its natural geographic advantages, and that we did not attempt to give any advantage in rates to Galveston, except where the distances favored it by very substantial proportions (Senate 1935 hearings, p. 7).

None of the amendments proposed by the New Orleans interests were adopted by either the Senate or House Commerce Committees in the bills which they reported to their respective Houses.

S. 1633, 74th Cong., 1st Sess., was reported first by the Senate Committee on Interstate Commerce on May 13, 1935, which characterized the bill as follows:

> The purpose of the bill . . . is to restore to the Interstate Commerce Commission the power to remove undue preference or prejudice against ports which it had exercised for many years prior to the five-to-four decision of the Supreme Court in *Texas & Pacific Ry. Co. et al.* v. *United States* (289 U.S. 627, May 29, 1933) holding that the word "locality" in paragraph (1) of section 3, did not include a "port" with respect to export and import traffic routed through such a port. (Sen. Rep. 885, 74th Cong., 1st Sess., pp. 1-2).

During the debate on the bill, the main opposition to its passage was generated by Senator Huey Long of Louisiana. He was fearful that, if the bill was passed, the benefit obtained by the port of New Orleans from the Supreme Court's decision in the *Texas & Pacific* case would be nullified. The Commission would then be in a position to issue a new decision reaffirming its prior conclusion that the Texas ports were entitled to a freight-rate differential under New Orleans where they enjoyed significant distance advantages. His objection to the bill was grounded squarely upon the proposition that, if "ports" were added to section 3(1), the Commission would then be empowered and obligated to accord ports with distance advantages a corresponding freight-rate differential. He presented his position *in extenso* during the Senate debate on the bill. Vol. 79, Cong. Rec. 10476, *et seq.*

During the course of the debates, Senator Connally of Texas asked rhetorically:

> If a port is nearer to a producing area, why is not that one of the natural advantages which it enjoys? Why should that port be discriminated against, and freight diverted by a longer mileage to another port? (Vol. 79, Cong. Rec., 10502)

It was also emphasized that by adding ports to section 3(1), it was intended that the same yardstick should be applied in determining whether there is a preference or

prejudice among different ports as is applied in determining that same question as between shippers or other localities:

> Mr. Walsh: There is no change in the yardstick. The same yardstick or the same method of reaching a decision by the Interstate Commerce Commission will exist with the word "port" in the law that now exists with the words "person, firm, corporation, or locality" in the law. It is simply an extension of the jurisdiction, where discrimination exists, to include "port" and embrace it within the word "locality."

During the course of the debates, Senator Long proposed the following amendment (79 Cong. Rec. 10596):

> Where rates and charges of common carriers to ports are made as reductions to equalize rates to ports served by competing carriers, it shall not be termed undue preference or discrimination.

The Long amendment was debated extensively (79 Cong. Rec. 10608-10619). The effect of the amendment was characterized as follows (79 Cong. Rec. 10610):

> Mr. Smith: The object [of the bill] is to prevent further discrimination against ports where they are more advantageously situated by virtue of their nearness to the source of supply. If this amendment should be agreed to, we might just as well tear up the remainder of the bill —
>
> Mr. Tydings: That is the way it appears to me.
>
> Mr. Smith: For the reason that any road which is farther away can reduce its rates to the given port in order to compete with those roads which are nearer to the port. Just strike out all the remainder of the bill and adopt this amendment, and we will have exactly the condition we now have.

Senator Long, in defending his amendment, said (79 Cong. Rec. 10618):

> The Senator from Maryland [Mr. Tydings] is absent now. Nonetheless, I have to answer some of the statements he makes. In speaking of the amendment, he says, "Suppose one railroad reduces its rate, and then the other railroad reduces its rate below the first reduction?"
>
> Such a thing is not contemplated by the amendment, Mr. President. I am sorry the Senator has gone. The amendment provides that the railroad line can reduce the rate to a point of equality, but there is nothing which permits the other railroad to reduce its rate below that equality without the consent of the Interstate Commerce Commission. * * *

But the Senators supporting the bill were vigilant to insist that the natural advantages of a port should be preserved. The Long amendment was defeated in the Senate by a vote of 49 to 23 (79 Cong. Rec. 10619).

Substantially all the legislative history of S. 1663 was made in the Senate. Following the passage of S. 1633 by the Senate, that bill was reported favorably by the House Committee on Interstate and Foreign Commerce (H. Rep. 1512, 74th Cong., 1st Sess. (1935), pp. 1-3), which described the effect of the proposed amendment as follows:

> The purpose of the bill S. 1633 is to restore to the Interstate Commerce Commission the power to remove undue preference or prejudice against ports which it had exercised for many years prior to the five-to-four decision of the Supreme Court in *Texas & Pacific Ry. Co. et al.* v. *United States* (289 U.S. 627, May 29, 1933), holding that the word "locality" in paragraph (1) of section 3, did not include a "port" with respect to export and import traffic routed through such a port. The majority opinion of the Court held that the word "locality" referred to "points of origin or destination." The minority opinion of Mr. Justice Stone, concurred in by three other justices, pointed out that the "commercial interests of a port, always

of great magnitude, may suffer the same destruction from discriminatory rates as do shippers or other industrial interests at points of origin or destination.

At the hearings held before a subcommittee of the Committee on Interstate and Foreign Commerce of the House on June 12 and June 18, 1935, and before a subcommittee of the Interstate Commerce Committee of the Senate on March 26 to 28, 1935, witnesses representing the ports of New York, Massachusetts, New Jersey, Pennsylvania, Maryland, Virginia, California, Oregon, Texas, and other States appeared in support of the bills H.R. 5361 and S. 1633, introduced, respectively, by Representative Rayburn and Senator Wheeler upon request of Federal Coordinator Eastman.

Representatives of the shippers also favored the bills which were opposed only by representatives of the port of New Orleans, of the Texas interior points of origin, and the two railroads which were involved in the Supreme Court decision. * * *

Paragraph (1) of section 3 of the act was enacted as section 3 of the original act to regulate commerce, February 4, 1887, and its language has remained unchanged throughout the intervening years. Until 1929 no doubt was ever entertained that the word "locality" was broad enough to include any place, including a port, and the Commission heard and decided many cases involving ports under that language.

In 1929 the Commission determined a controversy between the ports of New Orleans and Galveston partially in favor of Galveston, which had complained that certain railroad rates on export traffic denied it the advantage of its closer distance to Texas origins and discriminated against it in favor of New Orleans, which was farther away from these points. That case was carried to the Supreme Court and resulted in the May 1933 decision limiting the meaning of the word "locality" to points of origin or destination. Thereafter the Seventy-third Congress and this Congress

have had a number of bills introduced to correct the situation by amending the paragraph in question so as to restore to the ports a right to complain of rail rates through the ports and to permit the Commission to entertain and decide such complaints.

The same considerations requiring such relief of the ports motivates the granting of similar relief to port districts, gateways, and transit points which otherwise could be discriminated against by the rail rates on traffic through them, without opportunity to complain.

In recommending that this bill be passed, the committee does so with the idea in mind that by amending section 3 of the Interstate Commerce Act as thus contemplated it will encourage and promote the freedom of movement of export, import, and coastwise commerce through the ports of the country. The committee considers that it is to the interest of the public that such commerce be permitted to move freely through as many available ports as the governing circumstances will reasonably permit, and that no restrictions upon and impediments to the free movement thereof should be imposed that are not clearly shown to be sound or economically justified. The recommendation of the committee that this bill be enacted is intended to afford competing ports a forum in which to complain of the rate adjustments which tend to concentrate the movement of the traffic through one port or a limited number of ports and to deprive other ports of an opportunity to handle a part of such traffic. The committee believes that such a diffusion of the traffic which moves through the ports will redound to the benefit of the producer and consumer in the interior by whom in the last analysis the transportation charges levied both for the transportation thereof and for the use of the facilities at the ports are ultimately borne.

The foregoing report has been set forth at some length in order to show the relationship of the portion quoted by the Commission in its decision (329 I.C.C. at 536; App. D hereto, p. D-10-11) to the full report. It is evident both from the legislative history and from the report of the House Committee itself that the portion of the latter quoted by the Commission in fact has a meaning opposite to that which, taken out of context, it may appear to have.

In contrast to the bitter and dramatic Senate debate, the House debate was perfunctory.

S. 1663 was passed by the House and became effective August 12, 1935.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

ILLINOIS CENTRAL RAILROAD COMPANY, ET AL., *Appellants*,
v.
CITY OF CHICAGO, ET AL., *Appellees*.
No.

ALLIED MILLS, INC., ET AL., *Appellants*,
v.
CITY OF CHICAGO, ET AL., *Appellees*.
No.

NEW ORLEANS TRAFFIC AND TRANSPORTATION BUREAU, *Appellants*,
v.
CITY OF CHICAGO, ET AL., *Appellees*.
No.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

JURISDICTIONAL STATEMENT

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v.
CITY OF CHICAGO, ET AL., *Appellees*. } No.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

JURISDICTIONAL STATEMENT

Appellants, Illinois Central Railroad Company, et al.,[1] Allied Mills, Inc., et al.,[2] and New Orleans Traffic and Transportation Bureau have appealed from a judgment of the United States District Court for the Northern District of Illinois, Eastern Division, which set aside orders of the Interstate Commerce Commission (the Commission), and submit this Jurisdictional Statement to show that the Supreme Court of the United States has jurisdiction of the appeals and that substantial questions are presented.

---

[1] Illinois Central Railroad Company, Chicago & Eastern Railroad Company, Gulf Mobile and Ohio Railroad Company, and Norfolk and Western Railway Company.

[2] Allied Mills, Inc., Central Soya Co., Inc., Lauhoff Grain Company, and Ralston Purina Company.

OPINIONS BELOW

The opinion of the District Court is reported at 291 F. Supp. 858. The initial report of the Commission, by Division 2, is reported at 325 I.C.C. 412, and the report of the full Commission on reconsideration is reported at 329 I.C.C. 529. The opinion and judgment of the District Court and the reports and orders of the Commission are reproduced in the appendices to the jurisdictional statement filed in the appeal from the judgment of the District Court taken by the City of Chicago and the Board of Trade of the City of Chicago.[3]

JURISDICTION

This action was brought under 28 U.S.C. §§ 1336, 1398, 2284 and 2321-2325 and 5 U.S.C. § 1009 (now §§ 701-706) to set aside orders of the Commission in a proceeding arising on complaint. The final judgment of the three-judge District Court was dated and entered on July 25, 1968. Timely motions for new trial and amended findings and conclusions were denied by the District Court on October 21, 1968. The notices of appeal were filed in the District Court on December 19 and 20, 1968.

The jurisdiction of the Supreme Court to review the judgment of the District Court by direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b). *I.C.C.* v. *New York, N.H. & H.R. Co.*, 372 U.S. 744 (1963); *Chicago & N.W. R. Co.* v. *Atchison, T. & S.F. R. Co.* 387 U.S. 326 (1967).

STATUTES INVOLVED

The statutes involved are §§ 1(5) and 3(1) of the Interstate Commerce Act (49 U.S.C. §§ 1(5) and 3(1)) and §§ 556(d), 557(c) and 706 of the Government Organization and Employees Act (5 U.S.C. §§ 556(d), 557(c) and 706), which are set forth in the Appendix hereto.

---

[3] This jurisdictional statement was filed in *City of Chicago, et al.* v. *United States, et al.*, No. 1047, October Term, 1968, and is hereinafter cited as "Chicago J.S."

QUESTIONS PRESENTED

The questions presented by these appeals arise out of the opinion and judgment of the District Court, which set aside orders entered by the Commission on a complaint respecting rail rates on soybeans, in carloads, from points in Illinois to Chicago, Illinois, for export, and remanded the cause to the Commission for further proceedings consistent with the opinion of the Court. The Commission found that the assailed rates had not been shown to be unjust or unreasonable or in contravention of the policy of Congress with regard to export rates on farm commodities, but that some of them were unduly preferential and prejudicial. The orders of the Commission required the defendant rail carriers to remove the undue preference and prejudice, but did not prescribe any new rates.

The questions presented are:

1. Whether the District Court erred in treating the orders of the Commission under review as having prescribed or approved freight rates.

2. Whether the District Court erred in holding that the Commission failed to make adequate findings in support of its conclusions.

3. Whether the District Court erred in remanding the cause to the Commission for further proceedings with directions to consider various economic and trade factors in passing upon the lawfulness of the assailed rates, including factors as to which neither the complainant nor any other party before the Commission had introduced evidence.

STATEMENT

1. Proceedings Before the Commission

This case involves the validity of reports and orders entered by the Commission in *Board of Trade of the City of Chicago* v. *Illinois Central R. Co.*, 325 I.C.C. 412 (1965),

329 I.C.C. 529 (1967), on a complaint of the Board of Trade of the City of Chicago against four railroads.[4] The complaint before the Commission alleged that the rates of the railroads on soybeans, in carloads, from points of origin in Illinois to Chicago, when for export, were unjust and unreasonable in violation of § 1(5) of the Interstate Commerce Act (49 U.S.C. § 1(5)); unduly prejudicial to the port of Chicago and unduly preferential of ports on the Gulf of Mexico in violation of § 3(1) of the Interstate Commerce Act (49 U.S.C. § 3(1)); and in violation of the policy of Congress with regard to export rates on farm commodities set forth in § 3(1a) of the Interstate Commerce Act (49 U.S.C. § 3(1a)). (Chicago J.S. C-1—C-2.) The Department of the Port of Chicago was an intervener in support of the complaint. Appellants Allied Mills, Inc., et al. and other processors of soybeans in Central Illinois and appellant New Orleans Traffic and Transportation Bureau were interveners in support of the position of the defendant railroads that the assailed rates to Chicago were not unlawful. (Chicago J.S. C-2.)

The export rates on soybeans from Northern and Central Illinois origins to Chicago were generally lower than the corresponding export rates on soybeans to Gulf ports; but from Southern Illinois origins the export rates on soybeans to Chicago were generally higher than the corresponding export rates on soybeans from that area to the Gulf ports. (Chicago J.S. C-3) The complainant sought rates to Chicago which were substantially lower than the existing rates. (Chicago J.S. C-2, C-17, C-25.)

The Commission in both reports found that the assailed rates "have not been shown" to be unjust or unreasonable or in contravention of the Congressional policy on export

[4] Illinois Central Railroad Company, Gulf Mobile and Ohio Railroad Company, Wabash Railroad Company, and Chicago & Eastern Railroad Company. (Chicago J.S. C-2.) Appellant Norfolk and Western Railway Company is successor in interest to Wabash Railway Company.

rates. (Chicago J.S. C-14, D-12.) On the issue of undue preference and prejudice, the Commission in both reports found that the assailed export rates to Chicago which were higher than the corresponding export rates from the same origins to the Gulf ports were unduly preferential of the Gulf ports and unduly prejudicial to Chicago, but that in all other respects the assailed rates "have not been shown" to be unduly preferential or prejudicial. (Chicago J.S. C-14, D-12.) This finding meant that the assailed rates from Southern Illinois to Chicago were unduly prejudicial to Chicago and unduly preferential of the Gulf ports to the extent they exceeded the corresponding rates from Southern Illinois to the Gulf ports, and that the rates from Northern and Central Illinois to Chicago had not been shown to be unduly preferential or prejudicial.

The Commission did not prescribe any new rates from Southern Illinois to Chicago, but left the method of removing the undue preference and prejudice to the defendant rail carriers. The orders required the carriers "to cease and desist from practicing the undue preference and prejudice found to exist," and "to establish . . . maintain and apply rates which will prevent and avoid the undue preference and prejudice found herein to exist." (Chicago J.S. C-14, D-14.) The carriers elected to remove the preference and prejudice found undue by lowering the rates from Southern Illinois to Chicago to match the corresponding rates from Southern Illinois to the Gulf ports. (See Brief for Plaintiffs in District Court dated Sept. 1, 1967, p. 5.)

The Commission in its reports set forth the basic economic facts and made findings which support its conclusion that, except to a limited extent, since corrected, the rates under attack "have not been shown" to be unlawful.[5] The

[5] The findings of the hearing examiner set forth in the appendix to the initial report (Chicago J.S. C-15—C-26.) were adopted by Division 2 of the Commission (Chicago J.S. C-7); and the findings of Division 2 were, in turn, adopted by the full Commission. (Chicago J.S. D-3, D-9, D-12.)

economic facts, discussion and findings take up approximately 23 pages of the reports. (Chicago J.S. C-3—C-26, D-3—D-12.) The findings with respect to the issue of whether the assailed rates were contrary to the Congressional policy with respect to export rates on farm commodities require no consideration, because the plaintiffs advised the District Court that the issue under § 3(1a) of the Interstate Commerce Act was "no longer involved."[6]

On the issue of justness and reasonableness under § 1(5) of the Interstate Commerce Act, the Commission found that to a large extent the assailed export rates to Chicago reflected the basic level of the rates on grain prescribed by the Commission in 1936 plus the general increases subsequently authorized by the Commission, and that from other Illinois origins the carriers had published lower rates to Chicago to meet truck and barge competition. (Chicago J.S. C-16.) The complainant's case was predicated largely on rate comparisons. These were analyzed by the Commission, and it concluded that they failed to demonstrate that the rates under attack were unjust or unreasonable. (Chicago J.S. C-6—C-7, C-17—C-19, D-8—D-9.)

The reports of the Commission contain extensive discussion and findings relating to the claim of undue preference and prejudice under § 3(1) of the Interstate Commerce Act. These relate to comparisons of the assailed export rates to Chicago with the export rates to the Gulf ports; comparisons of the assailed rates with those sought by the complainant; the volume of soybean traffic to Chicago and the Gulf ports; the competitive situation in the transportation and marketing of soybeans; the shortage of soybeans in Central Illinois, where many of the processing plants are located; and the rate advantage which Chicago would have over the Gulf ports if the Commission were to prescribe

[6] In note 1 on page 2 of their brief in the District Court dated Sept. 1, 1967, plaintiffs stated: "The complaint also alleged a violation of section 3(1a), but this issue is no longer involved."

the reduced rates sought by the complainant. (Chicago J.S. C-7—C-14, C-25—C-26, D-9—D-12.) The Commission concluded that the complainant had failed to show any undue preference of the Gulf ports or undue prejudice to Chicago except in the rates from Southern Illinois. (Chicago J.S. C-12—C-14, D-10—D-12.)

Significant findings made by the Commission in its report on reconsideration include the following:

> "... the level of the rates [on soybeans for export] sought by the complainant could have adverse effects upon processors in central Illinois. It appears that the possibility exists of creating a preferential situation in treating the one of which complaint is made. . . . Under the sought rates, the export of soybeans would obviously be favored. . . . Chicago . . . is not only not disadvantaged, except as to rates from southern Illinois origins, but under the sought basis would receive an additional advantage over the Gulf ports which would tend to impede the free flow of traffic as between the ports here involved. . . . the record herein establishes not only a general rate advantage but also a generally adequate supply of soybeans for storage and for export at Chicago. . . . Chicago dominates the soybean traffic due to its geographical advantage of proximity to the producing area and presently lower rates. . . . the port of Chicago is only entitled to rates which are no higher than those to the Gulf ports. . . . (Chicago J.S. D-9—D-12.; paragraphs not indicated.)

2. Proceedings in the District Court

The original complaint filed in the District Court on March 22, 1966, was directed to the initial report and order of the Commission by Division 2. An amended complaint directed to both orders and reports of the Commission was filed on April 28, 1967.

The plaintiffs were the City of Chicago, an intervener in support of the complaint before the Commission, and the Board of Trade of the City of Chicago, the complainant before the Commission. The defendants were the United

States and the Commission. The intervening defendants in the District Court were: appellants Illinois Central Railroad Company, et al, the defendants before the Commission; appellants Allied Mills, Inc., et al, and other processors of soybeans with plants located in Central Illinois, interveners before the Commission; and appellant New Orleans Traffic and Transportation Bureau, an intervener before the Commission.

The plaintiffs argued to the District Court that the Commission had failed to make adequate findings to justify its conclusions and had misconstrued §§ 1(5) and 3(1) of the Interstate Commerce Act. These contentions were disputed in the arguments of the Commission and the intervening defendants. The United States in its answer stated that it neither supported nor opposed the orders of the Commission.

The opinion of the District Court was entered on July 25, 1968. (Chicago J.S. A-1, B-1.) The issues of statutory construction were not passed upon by the Court, but it held that the findings made by the Commission were inadequate. (Chicago J.S. A-11.) Statements throughout the opinion indicate that the Court considered the reports and orders of the Commission as having prescribed or approved rates rather than as having found that the assailed rates had not been shown to be unlawful, except from Southern Illinois. (Chicago J.S. A-4—A-8, A-10—A-11.)[7] Various statements made in the opinion indicate that the Court was also of the view that the Commission was required to consider various economic and trade factors as to which there was no evidence in the record before the Commission. (Chicago J.S. A-7—A-8, A-10.)

The judgment of the District Court, entered concurrently with its opinion, set aside the Commission's orders and

[7] The District Court's opinion refers to the rates as having been "fixed," "assigned," or "approved" by the Commission, and as having been found by it to be "just and reasonable" or "not unduly preferential or prejudicial."

remanded the cause for further administrative proceedings consistent with the Court's opinion. (Chicago J.S. B-1.) Motions for new trial and amended findings and conclusions filed by plaintiffs and by all of the intervening defendants were denied by the District Court on October 21, 1968, and its judgment thereupon became final. Notices of appeal from the judgment were filed by plaintiffs and by these appellants on December 19 and 20, 1968.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

These appeals raise important questions in the administration of the Interstate Commerce Act and the judicial review of orders of the Commission denying relief on the ground that the complainant had failed to make a case.

1. The District Court erred in approaching the issues before it on the wholly erroneous premise that the Commission had somehow prescribed or approved rates on soybeans from Illinois origins to Chicago for export, and therefore was required to make findings which would support an affirmative prescription of rates. This indicates that the Court misconstrued the nature and effect of the Commission's orders.

The proceeding before the Commission arose on the complaint of the Board of Trade, which, as the complaining party, had the burden of proving that the assailed rates to Chicago were in violation of the Interstate Commerce Act. *Louisville & N. R. Co.* v. *United States,* 238 U.S. 1, 11 (1915); *Swift & Co.* v. *United States,* 343 U.S. 373, 382, 385 (1952); 5 U.S.C. § 556(d). The Commission found that the complainant had failed to sustain this burden, except in the case of the rates from Southern Illinois to Chicago, which were found unduly preferential of the Gulf ports and unduly prejudicial to Chicago to the extent they exceeded the corresponding rates to the Gulf ports. The finding of the Commission that the rates under attack had not been shown to be unjust or unreasonable and its finding that the rates had not been shown to be unduly preferential

or prejudicial except from Southern Illinois did not constitute a prescription or an approval of the rates. *I.C.C.* v. *Inland Waterways Corp.*, 319 U.S. 671, 686 (1943).

The orders entered by the Commission did not prescribe or approve any existing rates or any new rates from any of the Illinois origin points to Chicago or the Gulf ports. The only command found in the orders (see p. 5, *supra*) was that the carriers remove the undue preference and prejudice found to exist in the rates from Southern Illinois to Chicago; and the carriers thus had the *option* of removing such preference and prejudice "by raising one rate, lowering the other, or altering both." *Texas & Pacific Ry. Co.* v. *United States*, 289 U.S. 627, 650 (1933). The carriers elected to comply with the orders by lowering the rates from Southern Illinois to Chicago (see p. 5, *supra*), and the measure of the rates published was thus determined by the carriers and not by the Commission. *I.C.C.* v. *Inland Waterways Corp.*, 319 U.S. 671, 686-687 (1943).

2. The holding of the District Court that the findings of the Commission were inadequate is plainly erroneous. These findings reflect the judgment of the Commission, on the record before it, that no affirmative prescription of new rates had been justified, and that the only relief warranted was an order directing the removal of undue preference and prejudice in the export rates from Southern Illinois to Chicago.

In its reports, the Commission explained why it was of the opinion that the complainant had failed to show that any of the rates under attack were unjust or unreasonable, or that any of such rates, except those from Southern Illinois, were unduly preferential or prejudicial. The Commission thus made the essential findings which constituted the basis for its refusal to grant the prescription of new rates sought by the complainant. No more was required. *Alabama G.S.R. Co.* v. *United States*, 340 U.S. 216, 227-228 (1951); *Minneapolis & St. Louis Ry. Co.* v. *United States*,

361 U.S. 173, 192-194 (1959); *Chicago & N.W. R. Co. v. Atchison, T. & S. F. R. Co.*, 387 U.S. 326, 358 (1967). In a memorandum[8] filed in the District Court, plaintiffs admitted that "There is no problem here knowing what the basis of the Commission's action was."

A different question would be presented if the Commission had prescribed or approved new rates. The Commission was not required to make findings in support of orders it did not enter.

3. The District Court further erred in setting forth in its opinion various economic and trade factors for consideration by the Commission in passing upon the lawfulness of the assailed rail rates. The factors enumerated are: the ultimate destinations of the export shipments of soybeans, the ocean shipping rates on soybeans, the quantities of soybeans shipped from the various points of origin, the terminal costs at the ports, other cost elements involved in the sale and transportation of soybeans, soybean meal, and soybean oil, and the profit margins of soybean processors in Central Illinois. These factors were variously described as "relevant," "necessary to complete the competitive picture," "necessarily involved," and "pertinent." (Chicago J.S. A-7, A-10.) The Court recognized the fact that there was no evidence in the record concerning these factors[9] (Chicago J.S. A-7), but it nevertheless remanded the cause to the Commission for further proceedings consistent with the Court's opinion.

Even if it be assumed that all of the enumerated factors were relevant and material to the issues before the Commission (which we deny is the case), the Commission was not required to supply a deficiency in the record. The

[8] Memorandum in Support of Plaintiffs' Motion for Amended and Additional Findings or for New Trial dated August 15, 1968, p. 5.

[9] There was evidence of the quantities of soybeans shipped to Chicago and the Gulf ports, but this did not show quantities from individual points of origin. (Chicago J.S. C-4, C-13, C-26.)

proper practice is that followed in *Swift & Co.* v. *United States,* 343 U.S. 373 (1952), which involved an order of the Commission dismissing a complaint charging that rates were unreasonable and unduly preferential and prejudicial. The Court held that the complainant had failed to sustain its burden of proof on both issues, and upheld the order without directing a remand of the cause for further administrative proceedings.

Although the District Court, near the end of its opinion, recognized that the economic and trade factors under discussion might present administrative questions (Chicago J. S. A-10), the fact remains that the earlier statements in the Court's opinion impose a mandate upon the Commission to consider and give weight to the factors enumerated. This is inconsistent with the rule that, absent an error of law, determinations as to whether freight rates are just and reasonable and free from undue preference and prejudice are factual questions for the expert judgment and discretion of the Commission. *I.C.C.* v. *Union Pacific R. Co.,* 222 U.S. 541, 547-548, 550 (1912); *Pennsylvania Co.* v. *United States,* 236 U.S. 351, 361 (1915); *Manufacturers Ry. Co.* v. *United States,* 246 U.S. 457, 481 (1918); *Western Chemical Co.* v. *United States,* 271 U.S. 268, 271 (1926); *Virginian Ry. Co.* v. *United States,* 272 U.S. 658, 665 (1926); *Board of Trade* v. *United States,* 314 U.S. 534, 546 (1942); *New York* v. *United States,* 331 U.S. 284, 326, 332, 347 (1947).

The District Court erred in remanding the cause with directions which invade the province of the Commission and which would require the Commission to gather evidence that the parties before it did not see fit to introduce.

CONCLUSION

For the foregoing reasons, probable jurisdiction of this appeal should be noted, and the case should be set for full hearing on the merits.

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APPENDIX

Statutes Involved

Section 1(5) of the Interstate Commerce Act, 49 U.S.C. § 1(5), provides:

> "All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

Section 3(1) of the Interstate Commerce Act, 49 U.S.C. § 3(1), provides:

> "It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

Section 556(d) of the Government Organization and Employees Act (formerly § 7(c) of the Administrative Procedure Act), 5 U.S.C. § 556(d) provides in pertinent part:

> "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof."

Section 557(c) of the Government Organization and Employees Act (formerly § 8(b) of the Administrative Procedure Act), 5 U.S.C. § 557(c), provides in pertinent part:

"The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of —

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof."

Section 706 of the Government Organization and Employees Act (formerly § 10(e) of the Administrative Procedure Act), 5 U.S.C. § 706, provides:

"To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall —

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be —

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."

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No. 1047

In the Supreme Court of the United States

OCTOBER TERM, 1968

CITY OF CHICAGO and BOARD OF TRADE OF THE CITY OF CHICAGO, Appellants

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ILLINOIS CENTRAL RAILROAD COMPANY, et al.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF AMICUS CURIAE OF TOLEDO-LUCAS COUNTY PORT AUTHORITY IN SUPPORT OF JURISDICTIONAL STATEMENT

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March, 1969

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BRIEF AMICUS CURIAE OF TOLEDO-LUCAS COUNTY PORT AUTHORITY IN SUPPORT OF JURISDICTIONAL STATEMENT

INTRODUCTION

This brief amicus curiae is filed herein, pursuant to Supreme Court Rule 42 (4), in support of the Jurisdictional Statement of the Appellants.

The Toledo-Lucas County Port Authority, hereinafter referred to as "Port Authority" is a duly constituted public port authority, organized and operating pursuant to Chapter 4582 of the Ohio Revised Code, responsible for the establishment and maintenance of the Port of Toledo as an international deep water port and for the development of the movement of cargo through that port.

The Port Authority concurs in and fully supports the Jurisdictional Statement of the Appellants both with regard to the issues presented and with regard to the discussion

of the substantiality thereof. It is not the purpose or intent of the Port Authority to establish or broaden the questions presented to this Honorable Court nor to develop the legal authorities upon which this controversy is founded. Rather, it is the purpose hereof to demonstrate the importance of the resolution of those questions to the Port of Toledo and to the Great Lakes range of ports and the dangers to both inherent in the absence of a dispositive ruling by this Court concerning the correct interpretation of Section 3 (1) of the Interstate Commerce Act.

THE QUESTIONS PRESENTED TO THIS COURT ARE SUBSTANTIAL

Of special relevance to the Port Authority is the statement on page 14 of the Jurisdictional Statement that "determination of the legal issues here involved is of particular importance to other Great Lakes ports which find themselves in much the same situation as is Chicago in their efforts to secure lawful and proper export-import inland freight rates. This is the first court test of the application of the Commission's arbitrary policy of port equalization to a Great Lakes port since the opening of the new St. Lawrence Seaway in 1959."

The St. Lawrence Seaway was opened at great public investment to permit the establishment of deep water ports on the Great Lakes in the heart of a vast area of production of export commodities in order to permit the establishment of economic and rational traffic patterns for the export of such commodities from those regions. In order to develop these ports in competition with the established larger tidewater ports it is essential that the protection accorded by Section 3 (1) of the Interstate Commerce Act against undue or unreasonable preference or advantage by common carriers to ports or port districts be properly enforced and that proper interpretation of that Section be definitively established.

The Port Authority, like most agencies charged with the development of the ports on the Great Lakes, is a relatively young organization lacking the economic and political powers and influence available to the older ports and to the rail carriers. It is simply not economically feasible, or indeed possible, for it and others similarly situated to seek remedial relief through the Courts on a case by case basis as unlawful rates are from time to time established. The Port Authority has been faced with this problem in regard to its protest of Trunk Line - Central Territory Railroads - Freight Tariff C/TN 245-I, ICC No. C-375 Supplement No. 151, and was forced by economic pressure wholly unrelated to the merits of its protest to capitulate upon the adverse decision of the Commission.

Like incidents have occurred and will no doubt continue to occur unless the instant case determines the proper basis for the establishment of rates to the various ports and port ranges. The economic impact on all Great Lakes ports of resolution of the questions presented in this case is immeasurable. The continued existence of some Great Lakes ports may well depend upon acceptance of this case for decision on its merits.

From the inception of the St. Lawrence Seaway, certain rail carriers have openly reflected a purpose to divert export cargo originating within geographic proximity to Great Lakes ports to the established tidewater ports. Those rail carriers have alternatively justified greatly disparate rates, transportation services considered, on the basis of a contrived and absurd purpose attributed by them to Section 3 (1) of the Interstate Commerce Act to foster export-import equalization of all ports on a single commodity basis by the arbitrary establishment of rates inversely proportioned to transportation services rendered as in the instant case; and, in other instances, on the basis of the competition for inland transportation of commodities for export including actual export transshipment from

Great Lakes ports through the St. Lawrence Seaway. The latter premise was tendered to justify Trunk Line - Central Territory Railroads - Freight Tariff C/TN 245-I, ICC No. C-375 Supplement No. 151. The Port Authority's vigorous protest and petition for suspension was denied by the Commission. Effectuation of the protested rates caused the Port of Toledo to lose all but a token of its soybean meal tonnage. From 149,336 net tons in 1967, tonnage fell to 1,728 net tons in 1968. This is a loss of 98.8% of a cargo originating in Toledo's natural tributary hinterland caused by preferential rail rates to the East Coast. Equally damaging losses could occur with respect to any other commodity singled out by the rail carriers for favored treatment on similar grounds.

It is inconceivable that the Commission can justify one disparate rate on the basis of port equalization and another on the basis of inland transportation competition by a port with a rail carrier serving that port. The latter basis of justification, utilized in the above cited tariff, ignores entirely the existence of the Great Lakes ports and regards all forms of shipments to coastal points as domestic traffic permitting railroads to compete for shipments to the Atlantic Ocean with the Great Lakes ports also served by such railroads.

So long as these railroads regard themselves as competitors of the Great Lakes ports, there can be no reasonable expectation of even-handed treatment in the rates they establish with relation to the Great Lakes ports. The problem gains peculiar urgency since the merger of formerly competing rail carriers in a few huge systems. The responsibility of the Commission to enforce the safeguards which the Act establishes against prejudicial or preferential treatment is necessarily increased as the effects of competition are diminished.

As noted in the Jurisdictional Statement filed by Appellants, this litigation is now in its sixth year. It would be

an unmitigated hardship to require these ports to institute new proceedings before the Commission upon rates hereafter established in violation of Section 3 (1) without specific guidelines for their disposition. Additional delay in obtaining a dispositive interpretation of the substantative law, estimated to endure some six or eight years, will operate to create mounting losses of cargo for the involved ports and to jeopardize their functional role as ports of transhipment.

CONCLUSION

For the foregoing reason, we submit that the questions presented are substantial and are of public importance and that the Court should note jurisdiction of this appeal; or, in the alternative, if the Court should believe that it is necessary or desirable that the District Court first pass on these questions, this Court should vacate the judgment of the District Court and remand the cause to that court with instructions to decide the questions of law presented.

Respectfully submitted,

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March, 1969

IN THE

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No. 1047

CITY OF CHICAGO AND BOARD OF TRADE OF THE CITY OF CHICAGO, *Appellants,*

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ILLINOIS CENTRAL RAILROAD COMPANY, ET AL.

On Appeal From the United States District Court for the Northern District of Illinois

---

BRIEF OF THE STATE OF ILLINOIS AS AMICUS CURIAE IN SUPPORT OF JURISDICTIONAL STATEMENT

STATEMENT

Pursuant to Rule 42(1) of the Supreme Court of the United States of America, the State of Illinois Department of Business and Economic Development, as Amicus Curiae, supports the Jurisdictional Statement heretofore filed between Appellant City of Chicago and Board of Trade of the City of Chicago, and states that the questions presented between Appellants

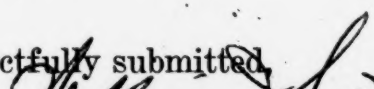
for decision by this Court are of Vital interest and concern to the State of Illinois and will have a direct and highly consequential bearing upon the international commerce of Illinois, the natural economic growth of its ports, particularly the Port of Chicago, and the well being of the total economy of Illinois.

In support of the Jurisdictional Statement filed by Appellants, the State of Illinois Department of Business and Economic Development hereby adopts the Brief of Authorities contained therein.

CONCLUSION

For the foregoing reasons, the State of Illinois submits that the questions presented are substantial and are of public importance, and that the Court should note jurisdiction of this Appeal; or, in the Alternative, if the Court should believe that it is necessary or desirable that the District Court first pass on these questions, this Court should vacate the Judgment of the District Court and remand the cause to that Court with instructions to decide the questions of law presented.

Respectfully submitted,



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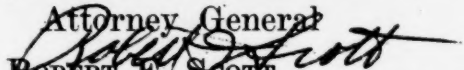

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March 1969

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v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ILLINOIS CENTRAL RAILROAD COMPANY, et al.

On Appeal From The United States District Court For The Northern District of Illinois

BRIEF OF THE STATE OF MICHIGAN AS AMICUS CURIAE IN SUPPORT OF JURISDICTIONAL STATEMENT

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On Appeal From The United States District Court For The Northern District of Illinois

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BRIEF OF THE STATE OF MICHIGAN AS AMICUS CURIAE IN SUPPORT OF JURISDICTIONAL STATEMENT

Statement

Pursuant to Rule 42(1) of the Supreme Court of the United States of America, the State of Michigan, as amicus curiae, supports the jurisdictional statement heretofore filed by the Appellant City of Chicago and Board of Trade of the City of Chicago, and states that the questions presented by the Appellant for decision by this Court are of vital interest and concern to the State of Michigan and will have a direct and highly consequential bearing upon the international commerce of Michigan, the natural economic growth of its ports and the well-being of Michigan's total economy.

Conclusion

For the foregoing reasons, the State of Michigan submits that the questions presented are substantial and are of public importance and that the Court should note jurisdiction of this appeal.

Respectfully submitted,

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Jerome Maslowski
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Assistant Attorneys General

March, 1969.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1047

CITY OF CHICAGO AND BOARD OF TRADE OF THE CITY OF CHICAGO, APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ILLINOIS CENTRAL RAILROAD COMPANY, ET AL.

No. 1048

ILLINOIS CENTRAL RAILROAD COMPANY, ET AL., APPELLANTS

v.

CITY OF CHICAGO, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

MOTION TO DISMISS AND AFFIRM

Pursuant to Rule 16(1) (c)–(d) of the Rules of this Court, the United States and the Interstate Commerce Commission move that the appeal be dismissed in No. 1047 and that the judgment of the district court be affirmed in No. 1048.

336-768—69

STATEMENT

These are separate appeals—in No. 1047 by the City of Chicago and Board of Trade of the City of Chicago (referred to herein collectively as "Chicago") and in No. 1048 by the Illinois Central Railroad Company and others [1] ("the railroads")—from the judgment of a three-judge district court on review of orders of the Interstate Commerce Commission (J.S. App. A and B, reported at 291 F. Supp. 858).[2] The court below vacated and set aside the Commission's orders, remanding the cause to the Commission for further proceedings. Neither the Commission nor the United States has appealed;[3] instead, the Commission has already reopened its proceedings for reconsideration and further hearings in light of the district court's opinion.

This case concerns railroad rates for transportation of soybeans destined for export. The facts are undisputed. The rates from Illinois points of origin to the port of Chicago have been, on the whole, lower than the rates from those points to ports on the Gulf of Mexico, although the rate per mile to Gulf ports is much lower (J.S. App. A–4—A–5). Prior to the Com-

[1] Chicago & Eastern Railroad Company; Gulf Mobile and Ohio Railroad Company; Norfolk and Western Railroad Company; Allied Mills, Inc.; Central Soya Co., Inc.; Lauhoff Grain Company; Ralston Purina Company; and New Orleans Traffic and Transportation Bureau.

[2] "J.S. App." refers to the Appendix to the Jurisdictional Statement in No. 1047.

[3] The United States, as statutory defendant, filed a neutral answer in the district court, neither supporting nor opposing the Commission orders.

mission's orders involved here, however, some railroad rates for soybeans were in fact *higher* to Chicago than to the more distant Gulf ports (J.S. App. A–4).

Chicago filed a complaint with the Commission contesting all the export soybean rates from Illinois points of origin to Chicago, both those that were higher and those that were lower than the Gulf port rates. The complaint contended that all of the rates were unjust and unreasonable, in violation of Section 1(5) of the Interstate Commerce Act, 49 U.S.C. 1(5); and that they were unduly prejudicial to the port of Chicago and unduly preferential to the Gulf ports, in violation of Section 3(1) of the Act, 49 U.S.C. 3(1) (J.S. App. C–1). Complainants sought an order requiring the railroads to reduce the rates on Chicago shipments to approximately the same rate-per-mile basis as the rates to the Gulf ports.

Following extensive hearings, the Commission's hearing examiner concluded that none of the rates in question had been shown to be unjust and unreasonable, but that all of the rates, whether higher or lower, resulted in an undue prejudice to Chicago (J.S. App. C–5).

Thereafter, Division 2, composed of three members of the Commission, affirmed the hearing examiner's recommendation that the complainants had failed to prove the unjustness or unreasonableness of the existing rail rates under Section 1(5). With regard to the Section 3(1) issue, however, the Division held that the port of Chicago was unduly prejudiced only inso-

far as the rates were higher than those to the competing Gulf ports, and ordered that such prejudice be ended (J.S. App. C–12—C–14). The Division rejected the complainants' contention that Chicago was unduly prejudiced where the rates were either lower than or the same as the rates to the Gulf ports, finding no showing that Chicago was unable to compete effectively at such rates for the available soybean traffic (J.S. App. C–13—C–14).

Subsequently the full Commission, by vote of eight to two, affirmed the decision of Division 2. Noting that the port of Chicago already dominated the export market for soybeans due to its geographical proximity to the Illinois producing areas and to its rate advantage in most instances, the Commission held that the complainants had failed to show that all rates to Chicago were unduly prejudicial (J.S. App. D–9 to D–12). The Commission rejected the contention that Chicago was entitled to a scale of rates based exclusively on distance from the soybean producing areas. Such a rate scale, it held, would unduly disadvantage others, including the more distant but otherwise competitively viable Gulf ports, by depriving them of the right to compete freely for the available soybean traffic; this would contravene the purposes of Section 3(1). (J.S. App. D–10—D–11.) Accordingly, except for the adjustment in the limited number of rates which had been higher to Chicago than to the Gulf ports, the Commission denied the relief requested by the complainants (J.S. App. D–12).

Chicago brought suit in the district court, and the court vacated and set aside the orders of the Com-

mission. The court held that the Commission had made inadequate subsidiary findings to support its conclusions with respect to the Chicago rate pattern (J.S. App. A–6—A–11). The court expressly declined to reach the question whether the Act permits equalization of rates for unequal distances (J.S. App. A–11).

ARGUMENT

1. The appeal by the Chicago parties, No. 1047, should be dismissed. Those parties were the initiators of this action in the district court, and the district court granted the relief they sought, setting aside the Commission's orders. They are dissatisfied because the district court declined to decide—for the guidance of the Commission on remand—that the Act as a matter of law requires that rates closely follow differences in distance. Such a ground has been rejected in the past,[4] but the district court found it unnecessary to reach the question because it found that in any event the Commission had inadequately justified its conclusions as to the propriety of the rates in question. These appellants' complaint is simply that they prevailed in the district court for the wrong reason, but that does not give them standing to appeal and thus their appeal should be dismissed. *Public Serv. Comm'n* v. *Brashear Freight Lines, Inc.*, 306 U.S. 204, 206–207; *Lindheimer* v. *Illinois Bell Tel. Co.*, 292 U.S. 151, 176; *New York Tel. Co.* v. *Maltbie*, 291 U.S. 645.

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[4] *City of Galveston* v. *United States*, 257 F. Supp. 243, 247–248 (S.D. Tex.), affirmed *per curiam*, 386 U.S. 269; *New York Central R. Co.* v. *United States*, 207 F. Supp. 483, 490–491 (S.D. N.Y.); *Boston & Maine R. Co.* v. *United States*, 202 F. Supp. 830, 837 (D. Mass.), affirmed *per curiam* by an equally divided court, 373 U.S. 372.

As noted above, the Commission has already reopened its proceeding, in compliance with the district court's order, to consider further what justifications there may be, consistent with Sections 1(5) and 3(1) of the Act, for the rate pattern that resulted from its prior order. The district court wisely declined to prejudge the Commission's further inquiry,[5] and the Chicago appellants have no standing to seek to compel it to do so.

2. The appeal by the railroads, No. 1048, is without substance. It raises only technical contentions that the district court misapprehended the nature of the Commission proceeding and the burden of proof therein, and that in specifying certain factors as not adequately considered by the Commission the court improperly infringed the Commission's exercise of its expertise on remand. We do not read the court's opinion as circumscribing those further proceedings. See *United States* v. *Saskatchewan Minerals,* 385 U.S. 94; *Arrow Transp. Co.* v. *Cincinnati, N.O. & T. Pac. R.R.,* 379 U.S. 642; *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* 309 U.S. 134, 145. Rather, the court did no more than suggest, in view of the theories on which the Commission appar-

[5] In asserting that the Commission has concluded that undue prejudice can result only where rates are unequal (J. S., No. 1047, 14) appellants attribute to the Commission a view which it does not hold. On the contrary, the Commission has found in appropriate circumstances that equal rates to competing ports may unduly prejudice one of the ports. See *City of Wilmington* v. *Alabama G. S. R. Co.,* 316 I.C.C. 709, 725–726, affirmed, 319 I.C.C. 620; *Galveston Commercial Ass'n* v. *Galveston, H. & S. A. Ry. Co.,* 128 I.C.C. 349, 379, 389.

ently proceeded, other factors as appropriate matters of Commission inquiry in passing upon the ultimate questions. *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 55; *Ford Motor Co.* v. *National Labor Relations Board*, 305 U.S. 364, 374.

CONCLUSION

The appeal should be dismissed in No. 1047, and the judgment of the district court should be affirmed in No. 1048.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1968

CITY OF CHICAGO and BOARD OF TRADE OF THE CITY OF CHICAGO,

Appellants,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ILLINOIS CENTRAL RAILROAD COMPANY, et al.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO DISMISS

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1047

CITY OF CHICAGO and BOARD OF TRADE OF THE CITY OF CHICAGO,

Appellants,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ILLINOIS CENTRAL RAILROAD COMPANY, et al.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO DISMISS

STATEMENT

Pursuant to rule 16(4) of the rules of this Court, appellants submit this brief in opposition to the motion to dismiss filed by the United States and Interstate Commerce Commission, herein collectively referred to as the Government.

The Government does not dispute the substantiality or general public importance of the questions of law here presented. Indeed, that could hardly be done in view of the Commission's own determination that the proceeding was one involving issues of general transportation importance. By its failure to appeal from the district court's decision and by filing a motion to affirm in No. 1048 the Government also concedes that the Commission's reports and orders are, as found by that court, irrational and unsupported by findings and substantial evidence. The sole question raised by the motion is whether appellants may maintain this appeal.

With respect to the merits, the Government incorrectly states (Mot., p. 5) the finding of the district court.[1] It also misstates, as the Commission attempted, unsuccessfully, to do in the district court, the position of appellants. Appellants do *not* take the position that the Act does not permit equalization of rates for unequal distances, and they do *not* take the position, as alleged by the Government (Mot., p. 5) "that the Act as a matter of law requires that rates closely follow differences in distances."[2]

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[1] The question which the district court said it would decline to consider was "whether simple equality of rates without regard to services precludes undue preference and prejudice under Section 3(1) of the Act." (J.S. App., p. A-11) This is an entirely different question from that stated by the Government.

[2] See *infra*, p. 6, for a brief statement of appellants' position, also the fuller statement in appellants' Jurisdictional Statement, pp. 10-18.

ARGUMENT

Title 28 U.S.C. § 1253 provides that "any party" may appeal to the Supreme Court from an order granting or denying a permanent injunction in any action required by Congress to be heard and determined by a district court of three judges. Despite the plain words of the statute, the Government argues that the appellants were the successful parties in the court below and are, therefore, not entitled to appeal.

Appellants were only partially successful in the district court. The major part of the relief sought by appellants was denied. In such a case, the parties aggrieved in part by the decision of the district court may appeal. *Cochran* v. *M & M Transp. Co.*, 110 F. 2d 519, 523 (1st Cir., 1940).

This action was brought for the purpose of obtaining a judicial interpretation of certain provisions of the Interstate Commerce Act upon which appellants' legal rights to just, reasonable, and non-prejudicial export rates depend. Paragraph 11 of appellants' amended complaint alleged not only that the Commission's orders were unsupported by findings and substantial evidence, but also that such orders "rest upon a misconstruction of section 1(5) and 3(1) of the Interstate Commerce Act" and that "such reports and orders are, therefore, unlawful and void" in violation of said Act. Appellants prayed that said orders be set aside and the matter remanded to the Commission for further proceedings "in accordance with law." While the district court found the orders to be irrational and unsupported by findings and substantial evidence, it specifically declined to grant the rest of the relief requested.

The cases cited by the Government are not in point. In *Public Service Com'n* v. *Brashear Freight Lines, Inc.*, 306

U.S. 204, 206-207, appellant, defendant in the court below, sought to appeal from the dismissal of a counterclaim for an accounting for fees due the State of Missouri, although the injunction sought by the plaintiffs against the Commission's enforcement of a Missouri regulatory statute had been denied. This Court held that such a direct appeal could not be prosecuted "unless there is a proper appeal from a decree granting or denying an interlocutory or permanent injunction." The Court added, by way of dicta, that the Commission, being the successful party, could not appeal from a denial of the injunction, although that question was not presented, citing *Lindheimer* v. *Illinois Bell Tel. Co.*, 292 U.S. 151, 176, and *New York Tel. Co.* v. *Maltbie*, 291 U.S. 645, which are the only other cases cited on this point in the Government's motion here.

Neither *Lindheimer* or *Maltbie* has any application here. In both those cases, a utility against which a rate order had been entered was successful in setting such order aside, but sought to have this Court review portions of the lower courts' decrees relating to valuation of the utilities' properties. Under those circumstances, the utilities were entirely protected by getting the orders complained of set aside. No further action could be taken against them except by an order which would again be reviewable by the courts.

The situation here is entirely different. For one thing, appellants seek affirmative relief. A commission order denying them that relief can be regularly set aside by the courts for lack of findings or substantial evidence every fourth or fifth year from now on and appellants will never obtain relief. The history of this litigation shows that appellants cannot obtain the relief to which they are entitled until the courts decide the questions of law relating to the correct interpretation of the statute.[3] In addition,

this litigation has not been terminated and appellants are faced with the direct and immediate threat of further proceedings which would serve no useful purpose whatsoever until the questions of statutory interpretation are settled.

That the Commission did incorrectly interpret the statute cannot be doubted.[4] The contrary is not shown by the citation of some prior cases which were correctly decided (Mot., p. 6, n.5). The lawfulness of the present order must

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[3] The motion of the Government makes no suggestion that the Commission will now follow a correct interpretation of the statute. It merely requests that the Commission be given another opportunity "to consider further what justifications there may be, consistent with Sections 1(5) and 3(1) of the Act, for the rate pattern that resulted from its prior order." The Commission has already had three opportunities to do this subsequent to its original decision. There is no reason why it should have another opportunity for *post hoc* rationalization of a rate adjustment obviously based on an incorrect interpretation of the statute.

[4] The Government concedes, as it must, that "the Division held that the port of Chicago was unduly prejudiced only insofar as the rates were higher than those to the Gulf ports." It suggests (Mot., p. 4) that such action was justified by the Commission's finding that there was "no showing that Chicago was unable to compete effectively at such rates for the soybean traffic." Actually Chicago did make a showing that it could not effectively compete for such traffic, but it is well settled as a matter of law that no such showing is necessary to establish undue prejudice, and the fact that traffic continues to move on prejudicial rates is no justification for such rates. *Northeast Kentucky Coal Bureau* v. *Chesapeake & O. Ry. Co.*, 206 I.C.C. 445, 448 (1938), order sustained in *Chesapeake & O. Ry. Co.* v. *United States*, 11 F. Supp. 588, 592 (S.D. W. Va., 1935), affirmed per curiam *Chesapeake & O. Ry. Co.* v. *United States*, 296 U.S. 187; *Chrysler Corp.* v. *Akron, C. & Y. R. Co.*, 279 I.C.C. 377, 404 (1950), order sustained in *Illinois Cent. R. Co.* v. *United States*, 101 F. Supp. 317, 323 (N.D. Ill., 1951); *Consolidated Mining & S. Co. of Canada* v. *N. Y. C. R. Co.*, 299 I.C.C. 231, 244 (1956), affirmed in *Ores, United States and Canada Origins to Eastern U. S.*,

be determined by what the Commission did here, not by what it did in other cases. Thus, the Government's reliance on *City of Wilmington* v. *Alabama G. S. R. Co.*, 316 I.C.C. 709, 725-726; 319 I.C.C. 620; and *Galveston Commercial Ass'n* v. *Galveston, H. & S. A. Ry. Co.*, 128 I.C.C. 349, 379, 389 is clearly misplaced. In fact, those cases clearly establish the correct interpretation of the statute and the principles of decision which the Commission should have followed here. What appellants are seeking here is to compel the Commission to follow the same interpretation of the statute and the same principles for determining preference and prejudice that it followed in the cited cases. If the Commission followed that interpretation and those principles, it would be compelled on the facts presented here to accord appellants the relief they seek. But, as indicated in the Jurisdictional Statement, the Commission has departed from that interpretation of the statute and those principles of decision in recent years and has proceeded on the theory that it has the right to compel or permit port equalization regardless of what the distances are. There simply is no other way to explain what the Commission has done here in the face of the great disparity in relative distances and services, and the Government suggests no other basis for the Commission's decision. The Commission made no attempt to distinguish the cited cases in its reports, but simply ignored them.

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303 I.C.C. 87, 94 (1958); *Cudahy Packing Co.* v. *Akron, C. & Y. R. Co.*, 318 I.C.C. 229, 246 (1962), order sustained in *Atchison, Topeka and Santa Fe Railway Co.* v. *United States*, 218 F. Supp. 359, 369-374 (N. D. Ill., 1963). Furthermore, as shown by the *Consolidated Mining* and *Cudahy* cases, the fact that Chicago dominates the soybean traffic from other areas is no defense to its complaint here. Chicago is entitled to non-prejudicial rates from central and southern Illinois regardless of the traffic it can obtain from other areas.

Both appellants and their adversaries (appellants in No. 1048) want to bring this litigation to an end and have their legal rights finally determined. Only the Government wants to prolong it. Even if the Government's argument were applicable here, such hypertechnicalities should not be allowed to defeat the ends of justice and cause unnecessary and wasteful litigation.

In any event, however, there is no merit to the Government's contention. As pointed out in our Jurisdictional Statement, pp. 19-21, Title 5 U.S.C. §706 specifically imposes on the courts the duty of deciding all relevant questions of law and of interpreting statutory provisions in reviewing administrative action. Appellants unsuccessfully sought to have the district court discharge these duties and, we submit, an appeal will lie from its failure to do so.

CONCLUSION

The motion to dismiss should be denied and probable jurisdiction of this appeal should be noted.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

ILLINOIS CENTRAL RAILROAD COMPANY, Et Al.,
Appellants,

v.

CITY OF CHICAGO, Et Al.,
Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968.

No. 1048

ILLINOIS CENTRAL RAILROAD COMPANY, Et Al.,
Appellants,

v.

CITY OF CHICAGO, Et Al.,
Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

BRIEF FOR APPELLANTS IN OPPOSITION TO MOTION TO AFFIRM

The United States and the Interstate Commerce Commission have filed a motion that the related appeal in No. 1047 be dismissed and that the judgment of the District Court be affirmed in No. 1048. This brief is filed by appellants in No. 1048* in opposition to the motion to affirm.

The judgment of the District Court is opposed for different reasons by parties on both sides of the rate controversy before the Commission. In the District Court, the appellants in No. 1047 were the plaintiffs, the United States and the Commission were defendants, and these appellants (No. 1048) were intervening defendants. The United States

* Illinois Central Railroad Company, Chicago & Eastern Railroad Company, Gulf, Mobile and Ohio Railroad Company, Norfolk and Western Railroad Company, Allied Mills, Inc., Central Soya Co., Inc., Lauhoff Grain Company, Ralston Purina Company, and New Orleans Traffic and Transportation Bureau.

took a neutral position, and the Commission and these apellants defended the Commission's orders. These appellants in their Jurisdictional Statement contend that the District Court erred in setting aside the orders of the Commission, and in remanding the case for further proceeding with improper instructions.

Movants' argument (page 6) misconceives the position of these appellants in their Jurisdictional Statement. The questions raised by these appellants are not merely "technical," as movants assert, but are substantial contentions which merit the consideration of this Court. Furthermore, these appellants do not argue, as movants suggest, that the District Court's opinion and judgment "circumscribe" the further proceedings which they direct the Commission to hold; on the contrary, these appellants contend that the judgment and opinion of the District Court improperly *expand* such proceedings.

The judgment of the District Court is not one which merely remands the case to the Commission for further proceedings; instead, it is a judgment which directs that the further proceedings be consistent with the opinion filed by that Court. The District Court's opinion evinces a misconception of the nature of the case, the orders entered by the Commission, and the judicial power to remand. Notwithstanding the fact that the administrative proceeding was one arising upon complaint, the District Court in effect directed the Commission to develop evidence as to various economic and trade factors which the complainant before the Commission did not see fit to offer, and invaded the administrative province of the Commission by directing it to give consideration to such factors in passing upon the lawfulness of the involved freight rates.

CONCLUSION

These appellants submit that if the motion to dismiss in No. 1047 is denied, the motion to affirm in No. 1048 should also be denied; and that, in any event, this Court should not permit the case to be remanded to the Commission with improper directions as to further proceedings.

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v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ILLINOIS CENTRAL RAILROAD COMPANY, et al.

On Appeal from the United States District Court For the Northern District of Illinois

BRIEF AMICUS CURIAE IN SUPPORT OF JURISDICTIONAL STATEMENT

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In the
Supreme Court of the United States

October Term, 1968

No. 1047

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OF THE CITY OF CHICAGO, Appellants

v.

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INTERSTATE COMMERCE COMMISSION,
ILLINOIS CENTRAL RAILROAD COMPANY, et al.

**On Appeal from the United States District Court
For the Northern District of Illinois**

BRIEF AMICUS CURIAE IN SUPPORT OF JURISDICTIONAL STATEMENT

INTRODUCTION

This brief amicus curiae is filed herein, pursuant to Supreme Court Rule 42(4), in support of the Jurisdictional Statement of the Appellants, by the State of Ohio, by its Counsel, the Attorney General of Ohio, Hon. Paul W. Brown.

The State of Ohio feels that the issues now being presented to the Court are of vital concern to the State. The State of Ohio supports the Jurisdictional Statement of the Appellants with regard to the issues presented. By this brief amicus curiae, the State of Ohio does not intend to broaden the questions presented to this Honorable Court nor to develop the legal authorities upon which this contro-

versy is founded. Rather it is the purpose hereof to request this Court to give a dispositive ruling concerning the correct interpretation of Section 3(1) of the Interstate Commerce Act.

THE QUESTIONS ARE SUBSTANTIAL

In 1959, with the completion of the St. Lawrence Seaway, the State of Ohio became involved with deep-water port activities. Such activities are becoming vital to economic growth and development of this State.

Ohio being seasonal and with its deep-water ports being relatively new must compete for export traffic with older, fully developed year-round tidewater ports, through which shipping patterns have been established over the years. If the Commission is allowed to deprive Chicago of the advantages of location (and, in turn, the Ohio ports) by permitting rail carriers to equalize rates to competing ports for distances several times as great as those to Chicago, and if this rule is applied to Ohio ports, then Ohio can never really develop her world ports to their fullest potential.

The economic impact to the Ohio ports and all of the Great Lakes ports of the resolution of the questions presented in this case is of vital economic concern. The continued existence of the Ohio ports may well depend upon the acceptance of this case for presentation upon its merits. How the Commission can justify one disparate rate on the basis of port equalization and another on the basis of inland transportation competition by a port with a rail carrier serving that port is irreconcilable. Such a justification has the impact of ignoring the existence of the Great Lakes ports. The legal theory, on which the Commission proceeded—that undue preference and prejudice cannot result from an equality of rates regardless of distance traveled—was exposed ages ago.

Therefore, it becomes vital for the economic growth and development of this State that the questions be resolved.

CONCLUSION

For the foregoing reasons, we submit that the questions presented are substantial and are of public importance and that the Court should note jurisdiction of this appeal; or, in the alternative, if the Court should believe that it is necessary or desirable that the District Court first pass on these questions, this Court should vacate the judgment of the District Court and remand the cause to that Court with instructions to decide the questions of law presented.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

October Term, 1968.

CITY OF CHICAGO ET AL. *v.* UNITED STATES ET AL.; and

ILLINOIS CENTRAL R. CO. ET AL. *v.* CITY OF CHICAGO ET AL.

APPPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

Nos. 1047 and 1048. Decided April 21, 1969.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.